HORÆ JURIDICÆ SUBSECIVÆ.

QUARE quis tandem me reprehendat, si quantum cæteris ad festos dies ludorum celebrandos, quantum ad alias voluptates, et ad ipsam requiem, animi et corporis conceditur temporis: quantum alii tempestivis conviviis quantum aleæ, quantum pilæ, tantum mihi egomet, ad hæc studia recolenda, sumpsero. *Cic. pro Archiâ.*

LE changement d'étude est toujours un delassement pour moi. *D'Aguesseau.*

Farrand & Co.'s Premium Edition.

HORÆ JURIDICÆ SUBSECIVÆ:

A CONNECTED SERIES OF NOTES,

RESPECTING THE

GEOGRAPHY, CHRONOLOGY AND LITERARY HISTORY OF THE PRINCIPAL CODES AND ORIGINAL DOCUMENTS

OF THE

Grecian, Roman, Feudal and Canon Law.

BY CHARLES BUTLER, ESQ.
OF LINCOLN'S INN.

WITH ADDITIONAL NOTES AND ILLUSTRATIONS
BY AN EMINENT AMERICAN CIVILIAN.

Est quôdam prodire tenus, si non datur ultra. Hor.

PHILADELPHIA:
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INTRODUCTION.

THE following sheets complete a very imperfect execution of a design, which, almost in the first moments of his engaging in the study of the law, the writer formed, of committing to paper, A SUCCINCT LITERARY HISTORY OF THE PRINCIPAL CODES EXTANT OF SACRED AND PROFANE LAW. Such a work, executed with ability, would be curious, interesting and instructive: the writer's projecting it shews his equal ignorance, at the time, of its nature and extent, and of his inability to execute it.

It has not, however, been wholly out of his mind; so that, for a great number of years, he has been in the habit of employing his leisure hours, in the study of these codes, and in committing to paper, his observations on them.

Encouraged

Encouraged by the reception, which a private impression of it had received among his friends, he published, in 1799, something in the nature of *a Literary History of the Old and New Testaments*, (on many accounts, the most important of all codes of law) under the title, "*Horæ Biblicæ, being a connected Series of Mis-*" *cellaneous Notes on the Original Text, Early* "*Versions, and printed Editions, of the Old and* "*New Testaments.*"

He has since circulated among his friends, a private impression of *a similar series of Notes on the Coran, the Zend-Avesta, the Vedas, the Kings, and the Edda*, the sacred Codes of the Mahometans, the Parsees, the Hindoos, the Chinese, and the Scandinavians.

The following sheets, containing *a similar series of his Notes on the Grecian, Roman, Feudal and Canon Law*, now solicit the reader's attention.

As some excuse for the imperfections of these compilations, he begs leave to mention, that he has had little leisure to bestow on them, beyond occasional bits and scraps of time, which a very laborious discharge of the unceasing duties of a very laborious profession has left at his command; and which he has always found it a greater relaxation to employ in this manner, than in any other.

What

Before Christ.

What is here said on THE GRECIAN LAW, may be found to contain some account of

What is said on THE ROMAN LAW, may be found to contain some account

V. 5. Fifth

1. Codes

What is said on THE CANON LAW, may be found to give some account

THE GRECIAN LAW.

I.

WHEN the space, which Greece fills in history, is considered, it is impossible to view, without surprise, the small extent of its GEOGRAPHICAL LIMITS.

In the largest sense of the word, Greece denotes the territories between Illyricum and Mœsia, to the north; the Ionian Sea, to the west; the Cretan, to the south; and the Ægæan, to the east. It is divided into the Regnum Macedonicum, which, in the time of Philip, consisted of Macedon, Thessaly, Epirus, and Thrace; and of the Græcia Vera, which was divided into three parts, Achaia, Peloponnesus, and the Islands. It is highly probable that Greece was originally peopled by the Pelasgi, an Asiatic horde, who, in successive emigrations, passed the Caucasus, the Don, the Neister, and the Danube, and spread themselves over a great part of Greece. At subsequent periods, it was peopled by various colonies

from Ægypt and Phœnicia. For a considerable time, all its inhabitants lived in a wild and barbarous state. Afterwards its fabulous, heroic, and historical ages successively follow.

II.

II. 1. Its LEGISLATION may be traced to its *fabulous age*.

In the mythology of the Greeks, the following is the genealogical history of justice. Chaos was the first of beings, and gave birth to Cœlum and Tellus, and to Erebus and Nox: Cœlum and Tellus were the parents of Jusjurandum and Themis; Erebus and Nox were the parents of Nemesis. Jupiter had Astræa and Dicé by Themis;—when the deities resided on earth, in the golden age, Astræa presided over the administration of justice; and when, in consequence of the vices of men, the deities fled to heaven, she was the last of them who remained on earth; but, at length, quitted it, and was translated into the sign Virgo, next to Libra, her balance. Ceres, the daughter of Saturn and Ops, taught mankind tillage, the worship of the gods, the use and rights of separate property, respect to parents, and tenderness to animals: on this account, both in the Greek and Latin writers, she is called the law-bearing Ceres; and both in Greece and Rome, she was worshipped, and had temples dedicated to her, under that name.

The

The earliest account of the fabulous age, on which any reliance can be placed, commences about 1970 years before Christ; when Argos, from which the north-eastern territory of Peloponnesus received its denomination, first began to acquire political eminence. It is said to have been founded by Inachus, in - - - - 1970

Before Christ.

His descendants filled the throne, till Gelanor, the tenth of them in succession, was expelled by Danaüs, a prince of Ægypt. - - - 1586

He is mentioned by some writers, as the first legislator of the Greeks; from him, the people of the peninsula, till then called Pelasgians, received the name of Danaans, which they retained in Homer's time.

II. 2. From that period, some appearance of real history being discernible in the accounts we have of what is generally called the fabulous age of Greece, it is supposed to verge to a conclusion, and the *heroic age* of Greece, is supposed to begin. The regular history of Grecian legislation commences with Theseus, one of the celebrated persons from whom that age received its appellation.

In a military expedition to the kingdom of Crete, undertaken by him, to deliver the Athenians from an ignominious tribute, paid by them to the monarch of that island, he had become acquainted with the laws of Minos. The excellence of those laws is highly celebrated by the writers

writers of antiquity: to us, they are chiefly known, as the foundation on which Theseus, and after him Lycurgus, built their respective systems of legislation. In the public education of their children, in the public repasts of the people, at which the rich and the poor promiscuously attended, in the division of the inhabitants into freemen and slaves, and in some other institutions of Minos, we trace the general system of legislation, adopted by the Spartan legislator. It is observable, that Minos was the first sovereign, to whom the splendid prerogative of the Dominion of the Sea* was assigned; but probably it was confined to the Cretan and a small part of the Ægæan Seas. On his death it was assigned to the princes of Argos.

On the return of Theseus from Crete, he abolished private jurisdictions, and subjected the whole territory of Athens to one common system of legislation; he divided the commonwealth into nobility, husbandmen, and artificers; and established an uniformity of religious rites and sacrifices. To the nobility and husbandmen he appropriated the executive powers, with the superintendency of religion: but a share in the legislation was given to all; no distinction prevailed, as in every other Grecian province, and afterwards in the Roman world, between the people in the capital, and the rest of the people; all were

* See Appendix, Note I.

united,

united, under the general name of Athenians, in the enjoyment of every privilege of Athenian citizens, and the monarch was rather their first magistrate than their sovereign. In consequence of these wise regulations, the Athenians seem to have acquired more civilized manners than the rest of the Greeks; they were the first who dropt the practice of going constantly armed, and thus introduced a civil dress in contradistinction from the military. Before Christ.

The subject leads to the mention of nothing of importance before the taking of Troy. - 1282

In his description of the shield of Achilles, Homer gives a striking account of a trial at law, in his times.

"The people were assembled in the market-"place, when a dispute arose between two men, "concerning the payment of a fine for man-"slaughter: one of them addressed himself to the "by-standers; asserted that he had paid the whole; "the other insisted, that he had received nothing; "both were earnest to bring the dispute to a ju-"dicial determination. The people grew noisy in "favour, some of the one, some of the other; but "the heralds interfering, enforced silence; and "the elders approaching, with sceptres of heralds "in their hands, seated themselves on the polished "marble benches in the sacred circle. Before "them, the litigants, earnestly stepping forward, "pleaded

" pleaded by turns: while two talents of gold lay " in the midst, to be awarded to him, who should " support his cause by the clearest testimony and " the clearest argument."

We find from Homer's writings, that, in his time, the rights of primogeniture were considerable; that, murder was punished rather by private revenge than public justice; that, conjugal infidelity, on the woman's part, was esteemed an heinous offence; that, on the man's, it was little regarded; and that, the breach of virgin honour was scarcely thought a crime.

It is observable that Homer makes no mention either of a pure republic, or of the absolute rule of one man: he is supposed to have been favourable to monarchical government; but it is said to be discoverable from his works, that, when he wrote, the general tendency of the public mind of Greece was democratic.

In the course of time, democracy obtained a complete victory over monarchy, in every part of Greece. The Heraclidæ, having acquired a settlement in Doris, invaded and made themselves masters of all Peloponnesus, except Arcadia. At first, they established a limited monarchy in the different provinces they conquered; but, having quarrelled among themselves, and confusion universally prevailing, monarchy was almost every where abolished, and the words, Tyrant and King, became synonymous.

II. 3. Here the heroic age of the history of Greece draws to a conclusion, and we perceive the dawn of its *historical æra.*

From this time, Greece must be considered as formed of a multitude of independent states, exercising complete sovereignty within their respective territories; bound together by no federal union, but connected by language, by their notion of a descent from a common stock, by a similitude of religious belief, and by frequent meetings at public games.

But nothing contributed to this general union more than the council of the Amphictyons: it is supposed to have been instituted by Amphictyon, the son of Deucalion. It met sometimes at Thermopylæ, sometimes at Delphi; the members of it were chosen by the principal cities of Greece. The object of the institution was to decide the differences, which happened among the Grecian states. Their determinations were always held in great veneration; and their influence is supposed to have continued till the reign of Antoninus Pius.

During the whole of the historical æra of Greece, except when some singular event raises a particular state into notice, Lacedæmon and Athens alone engage the attention of the historian or civilian.

III.

THE æra of Grecian legislature begins with the **LAWS OF LYCURGUS**, the most singular institution recorded in history. - - - Be Ch 92

He established two Kings, and a Senate of twenty-eight members, appointed for life; the Kings were chosen by the people, were hereditary senators, high priests of the nation, and commanders of their armies; but they were controlled, in the exercise of their power, by five Ephori, created annually. With the senate, all laws were to originate; the general assembly of the people had the power of confirming them; but public debate was wholly forbidden the general assembly. Lycurgus effected an equal division of land among all the citizens; he abolished the use of gold and silver; and ordained, that all children should be educated in public: every citizen was to be a soldier; all sedentary trades, and even agriculture, were forbidden them; the ground was cultivated by the Helotæ, a kind of slaves, whom the Lacedæmonians treated with the greatest cruelty.

Thus, Lycurgus effected a total revolution of law, property, and morals, throughout the whole of the Spartan territory: no legislator ever attempted so bold a plan. It has been observed, that,

that, if he had merely been a legislator in specu- Before Christ.
lation, his scheme would have been thought more visionary than Plato's; it may be added, that, if the existence and continuance of his institutions were not proved, beyond argument, by the highest degree of historical evidence, the relations of them would be pronounced a fiction, on account of what would be termed their evident impracticability. Yet, the first establishment of them was attended with little resistance, and with no political convulsion; they remained in vigour longer than any political institution of antiquity known to us, and were respectable even in their decay.

IV.

1. DRACO was the first legislator of ATHENS: of his laws we know little more than that their extreme severity was proverbial. - - - 624

He made all crimes capital, on the ground, that a breach of any positive law was a treason to the state.

Solon framed for his countrymen, a new and milder system of law. - - - - - 594

Mr. Tytler's Elements of Ancient History, 1st vol. 49—52, gives us the following concise and clear view of *Solon's Legislation.*

"Solon, an illustrious Athenian, of the race "of Codrus, attained the dignity of Archon 594

" B. C.; and was intrusted with the care of fram-
" ing, for his country, a new form of government,
" and a new system of laws. He possessed ex-
" tensive knowledge, but wanted that intrepidity
" of mind, which is necessary to the character
" of a great statesman. His disposition was mild,
" and temporising, and, without attempting to
" reform the manners of his countrymen, he ac-
" commodated his system to their prevailing habits
" and passions.

" The people claimed the sovereign power,
" and they received it: the rich demanded offices
" and dignities: the system of Solon accommo-
" dated them to the utmost of their wishes. He
" divided the citizens into four classes, according
" to the measure of their wealth. To the three
" first, (the richer citizens,) belonged the offices
" of the commonwealth. The fourth, (the poorer
" class,) more numerous than all the other three,
" had an equal right of suffrage with them, in
" the public assembly, where all laws were fram-
" ed, and measures of state were decreed. Con-
" sequently the weight of the latter decided every
" question.

" To regulate, in some degree, the proceed-
" ings of their assemblies, and balance the weight
" of the popular interest, Solon instituted a senate
" of 400 members, afterwards enlarged to 500
" and 600,) with whom it was necessary that
" every

" every measure should originate, before it became " the subject of discussion in the assembly of the " people.

" To the court of Areopagus he committed " the guardianship of the laws, and the power of " enforcing them, with the supreme administra- " tion of justice. To this tribunal belonged, like- " wise, the custody of the treasures of the state, " the care of religion, and a tutoral power over all " youth of the republic. The number of its judges " was various, at different periods, and the most " immaculate purity of character was essential in " that high office.

" The authority of the Senate and Areopagus " imposed some check on the popular assemblies; " but, as these possessed the ultimate right of de- " cision, it was ever in the power of ambitious " demagogues to sway them to the worst of " purposes. Continual factions divided the peo- " ple, and corruption pervaded every department " of the state. Their public measures, the result " of the interested schemes of individuals, were " often equally absurd as they were profligate. " Athens often saw her best patriots, the wisest " and most virtuous of her citizens, shamefully " sacrificed to the most depraved and most aban- " doned.

" The particular laws of the Athenian state " were more deserving of encomium than its

" form

" form of government. The laws relating to " debtors were mild and equitable, as were those " which regulated the treatment of slaves. But " the vassalage of women, or their absolute sub- " jection to the control of their nearest relation, " approached near to a state of servitude. The " proposer of a law, found on experience impolitic, " was liable to punishment; an enactment appa- " rently rigorous, but probably necessary in a " popular government.

" One most iniquitous and absurd peculiarity " of the Athenian, and some other governments " of Greece, was the practice of the ostracism, " or a ballot of all the citizens, in which each " wrote down the name of the person in his opi- " nion most obnoxious to censure; and he was " thus marked out by the greatest number of voices, " and, though unimpeached of any crime, was " banished for ten years from his country. This " barbarous and disgraceful institution, ever capa- " ble of the grossest abuse, and generally subser- " vient to the worst of purposes, has stained the " character of Athens with many flagrant in- " stances of public ingratitude." A full account of the laws of Athens may be found in Archbishop Potter's Archæologia Græca, B. 1. The fragments of them were published by Petitus, with an excellent commentary. A splendid edition of the work, with his own notes and those of Palmerius,

Palmerius, Salvinius, and Duker, was published by Wesseling, in 1742.

IV. 2. This may be considered a succinct view of the constitution of Athens, as it was established by Solon. The following is a short account of their *Forensic proceedings* in the civil administration of justice.

All cases, respecting the rights of things, belonged to the jurisdiction of the Archon: he had six inferior magistrates, of the same name for his assessors. The person who sought redress in a court of justice, denounced the name of his adversary, and the cause of his complaint to the sitting magistrate; and, if the sitting magistrate thought the cause of action maintainable, he permitted the complainant to summon the defendant: if the defendant disobeyed the summons, he was declared infamous; if he obeyed it, the parties were confronted, and were at liberty to interrogate one another. If the magistrate thought there was a probable cause of action, he admitted the cause into court; here the pleadings began, and were continued till the parties came to some fact, or some point of law, asserted on one side, and denied by the other; this brought them to issue: then, all the pleadings and evidence in the causes were shut up in a vessel, which was carried into court. The Archon then assigned the judges to try the cause, and they decided not only upon the fact, but upon the law of the case.

One

One mode of process in use at Athens, bears a resemblance to the modern practice of trying the title to the freehold by ejectment. That, in its original state, was an action brought by a lessee for years, to repair the injury done him by dispossessing him of his term. To make it serve as a legal process for recovering the freehold, the law now supposes, that the party dispossessed has entered on the land; that he has executed a lease of it; and that his lessee has been dispossessed: for this injury, the lessee brings his action of ejectment to recover the term granted by the lease: now, to maintain his title to the lease, he must shew a good title in his lessor; and thus incidentally and collaterally the title to the freehold is brought before the court. In the jurisprudence of Athens, the guardian and ward were so far identified, that the latter could not maintain an action against the former; so that, for any injury done to his property, the ward, during the term of pupilage, was without remedy. For his relief, the law authorised the Archon to suppose a lease had been executed by the ward to a stranger; then, the stranger, a kind of next friend, was to bring his action against the guardian, for the injury done to his property during the term; and, if he recovered, he became trustee of what he recovered for the award. Thus, in each case, a fictitious lease was used as a legal process for bringing the real merits of the case to trial.

Sir

Sir Matthew Hale, in his History of the Common Law, and Sir William Jones, in the Notes to his translation of Isæus, make particular mention of the law of succession at Athens. It is observable, that, though a general equality of property was one of the principal objects of Lycurgus's legislation, he assigned to the eldest son almost the whole of his parent's property, with an obligation of providing for his sisters and younger brothers. Before Christ.

V.

WITH the death of Solon, the æra of Grecian legislation finishes, and the æra of her military glory begins. But, early in this brilliant period of her history, THE DECLINE OF THE LAWS OF ATHENS AND LACEDÆMON is discernible. 490

With respect to *Athens*, it has been mentioned, that, by the laws of Solon, the lowest class of citizens had been excluded from offices of state. These, on the motion of Themistocles, were opened to them: this lessened the general dignity of the magistrature, and introduced venality and disorder into every department of the administration. Here, however, the mischief did not rest. As the poor were under a necessity of giving almost the whole of their time to the labour, on which their daily sustenance depended, they had

had scarcely any opportunity of attending the public assemblies of the people; but, on the motion of Pericles, every Athenian, who assisted at a public assembly, received three oboli for his attendance: this increased the tumult and corruption of the public assemblies: and this was not the only instance in which Pericles sacrificed much of Solon's law to the caprice of the people. Before Christ.

In respect to *Lacedæmon*, the victories of Lysander and Agesilaüs carried the Spartans into foreign countries, and brought the wealth of foreign countries into Sparta. The consequence was, that what the Lacedæmonians gained by their military successes, they lost in consequence of the decline, which those very successes occasioned, of the principles and habits of heroic virtue, which the legislation of Lycurgus had inculcated among them, and which had made them the wonder of Greece.

Insensibly the glory of Athens and Lacedæmon expired. At the battles of Leuctra and Mantinæa, they received a check, from which they never recovered.

At the battle of Cheronæa, king Philip of Ma- 387
cedon obtained a complete triumph over the Athenians; and, by degrees, the laws of Solon fell into disuse.

By the direction of Antipater, to whom the general superintendence of the affairs of Greece

was

was committed by Alexander the Great, when he set out on his expedition to Persia, they were restored, with some modifications, by Demetrius Phalereus, and continued in that state, while Greece was subject to Alexander's successors. - 280 Before Christ.

When the Romans conquered Greece, they allowed to the different states the use of their laws; insensibly the Romans acquired a taste for the arts and literature of Greece, and this particularly recommended the Athenians to them.

On a complaint by the Athenians, that too many changes had been made in the laws of Solon, the Emperor Adrian accepted the office of Archon, and restored the ancient law. - - - 130 After Christ.

The Emperor Constantine was not so favourable to the Athenians;—in the Emperor Julian, they had a zealous friend. - - - 360

By an edict of the Emperor Justinian, the schools of Athens were shut up: this is generally assigned as the æra of the extinction of Paganism, and of the absolute decline of the philosophy and jurisprudence of Athens. - - - - 529

With the history of the decline of the Laws of Lycurgus, we are less acquainted. Though in a state of decay, their appearance was venerable in the time of Polybius: perhaps they suffered less than the Laws of Athens, during the Macedonian influence in Greece; and probably they engaged less of the attention of the Romans; but

we have no reason to suppose they long survived the Athenian Law. After Christ.

On the division of the empire between the sons of Theodosius, Greece was allotted to the Emperor of the East: it suffered much from the incursions of the Goths under Alaric. 395

In the twelfth century, the emperor Manuel divided Peloponnesus between his seven sons: before this time, from the resemblance of its shape to that of a mulberry tree, called Morea in Greek, and Morus in Latin, it had received the appellation of The Morea. In the next century, when Constantinople was taken by the Western Princes, the maritime cities of Peloponnesus, with most of the islands, submitted to the Venetians. In the fifteenth century, the whole Morea fell an easy prey to Mahomet II., after his conquest of Constantinople. Towards the close of the seventeenth century, the Ottomans were expelled from it by the Venetians, and it was formally ceded to them by the Porte, at the treaty of Carlowitz: but, about fifteen years afterwards, it was regained by the Porte, and now forms a part of their empire, under the appellation of the Beglergbeg of Greece. It is governed by a military officer, called a Sangiac, who resides at Modon. 1100 1200 1460 1699

Such have been the rise, progress, and decline of the Laws of Greece.

The

The great influence of the Roman Law on the jurisprudence of modern nations is strikingly discernible, in every part of their laws:—if it be true, that Rome derived her law from the Athenian code, the "Græcia capta ferum victorem cepit," is as applicable to the legislation as it is to the arts of Greece.*

* This article is principally extracted from *Ubbo Emmius's Vetus Græcia Illustrata*, 3 *vol.* 8*vo*, the best geographical account of Greece, which has yet appeared; from *Archbishop Potter's Antiquities of Greece*, a work of great learning; from *Bruning's Compendium Antiquitatum Græcarum; Francofurti ad Mænum*, 1 *vol.* 8*vo*, 1735, an useful abridgment of the Archbishop's work; from various treatises of Meursius, particularly his *Themis Attica;* from *Mr. Mitford's and Doctor Gillies's Histories of Greece;* and from *Sir William Jones's Translation of Isæus*, a lasting monument of his industry, and his wonderful quickness in the acquisition of accurate and extensive knowledge, even of the abstrusest kind.

THE ROMAN LAW.

I.

THOSE, who wish to trace the ROMAN LAW to its origin, almost immediately find themselves obliged to form an opinion on a point which has been the subject of much discussion, and a decision upon which is not very easy, *the degree of credit due to the histories, which have reached us, of the five first ages of Rome.* The credibility of them was ingeniously attacked by M. de Pouilly, and as ingeniously defended by L'Abbé de Salier, in their dissertations on this subject, in the Mémoires de l'Académie. In his discourses, Sur l'incertitude des cinq premiers siécles de l'histoire Romaine, M. de Beaufort seems to have determined the question. By a variety of arguments, drawn from the scantiness of the materials, from which these histories appear to have been framed, from the romantic nature of several of the exploits recorded in them, the improbability of many, and evident falsehood

of

of some of their relations, and from the contradictions and absurdities, with which they frequently abound, he shews that, at least, where they descend into particulars, they should be read with a considerable degree of distrust. What they mention of the populousness of Rome, which, before the end of her second century, contained, by their accounts, 500,000 persons, appears incredible: but a smaller number would not have sufficed to construct the public works, with which, even then, Rome abounded. This circumstance has struck some modern writers so forcibly, that, to account for it, they have supposed, that Rome was raised on the ruins of a city, which, though now wholly forgotten, was once populous and magnificent, and the seat of a powerful empire. In pursuing this research, some have found such an empire among the Hetruscans. With the particulars of the history of that people, we are little acquainted; but we have certain information,* that, long before the æra of the foun-

* See the Appendix to the ancient Universal History, vol. 18. p. 187., and Maffei's Verona Illustrata, b. 1. The expression of Livy, b. 1. c. 2., is very strong, "Tanta opibus "Etruria, ut jam non terras solum, sed mare etiam per totam "Italiæ longitudinem, ab Alpibus ad fretum Siculum, famâ "nominis sui implesset." On the other hand, the silence of Herodotus may be thought a strong argument against the existence of such a city in his time.

dation

dation of Rome, they were a flourishing state, excellent in arts and arms.

II.

THE first object in the study of the Roman Law, is to obtain an accurate view of the LIMITS OF THE COUNTRIES, in which it prevailed, before the dismemberment of the empire. They may be divided into Italy, the conquests of the Romans in the other parts of Europe, and their conquests out of Europe.

II. 1. *Italy* lies 7. 19. East long., and 38. 47. North lat.: the Alps divide its northern part from France, Switzerland and Germany; on every other side, it is washed by the Mediterranean. Its natural separation is into its northern, central, and southern divisions. Its northern division contains the modern Lombardy and the territories of Venice and Genoa, and reaches on every side to the Alps, from a line which may be supposed to be drawn from the Rubicon on the eastern, to the Macra on the western side of Italy.*

Its central division extends from the Rubicon to the Trento, near the Fortori, on the eastern sea, and from the Macra to the Silaro, on the western and comprises Etruria, Umbria, Picenum, Sabinia, Latium, Lavinium, and Campania, or Tuscan ,

* See Appendix, Note II.

the

the Ecclesiastical State, and the territory of Naples: its southern part contains the remainder of Italy, the Marsi, the Samnites, the Apulians, and the Lucanians. Before the Roman conquests of it, the northern division of Italy had been occupied by a colony of Gauls: on that account, it was known to the Romans, by the name of Gallia Cisalpina; and, from its being intersected by the Po, the northern division, made by that river, was called by them the Transpadanan, the southern was called the Cispadanan Gaul. The southern part of Italy was peopled by colonies from Greece; on that account it was called Magna Græcia, by the Romans:—the part between Gallia Cisalpina and Magna Græcia, was called Italia Propria, or Italy Proper. The part of the Mediterranean, on the eastern side of the peninsula, was called the Higher, and afterwards the Hadriatic Sea; the part on its western side, was called the Lower or Tyrrhenean Sea.

With respect to its Ancient State, it is probable, that the greatest part of Italy was in possession of the Hetruscans, when, about the year 964 before Christ, Evander arrived in Latium, and built a small town called Palantium. It is supposed, that Latinus reigned there, about the time of the Trojan war; that, in his reign, Æneas landed in Italy, married Lavinia his daughter, and built Lavinium; that Ascanius, the son of Æneas, built Alba; that Romulus descended from him, and

and laid the foundation of Rome, 753 years before Christ.

The monarchical government of Rome subsisted about 250 years; during the whole of this time, Rome was engaged in war with her neighbours; and perhaps the utmost extent of her conquests did not exceed a circumference of fifteen miles. In the next 250 years, the Romans conquered the remaining part of Italy, from the Alps to its southern extremity: then the conflict between her and Carthage commenced. From the destruction of Carthage, the æra of her foreign conquests may be dated; in the reign of Augustus, they reached the Atlantic, on the west; the Euphrates, on the east; the Rhine and the Danube, on the north; and Mount Atlas and the Cataracts of the Nile, on the south: under Domitian, they were carried to the Frith of Forth and the Clyde; and, under Trajan, over the Danube into Dacia; and over the Euphrates, into Mesopotamia and Armenia.

II. 2. *The European part of this spacious conquest* contained Hispania, or the kingdoms of Spain and Portugal: Gaul, which comprised the whole country between the Pyrenees, the Ocean, the Rhine, and the Alps, or the present territory of France, with the addition of Switzerland: Britannia, which comprised all England, Wales, and the lowland parts of Scotland, up to the Frith of Forth and the Clyde: the Rhœtian and Vindelician provinces, which nearly comprised the Grisons,

Grisons, the Tyrolese, and a part of Bavaria: the Norican, Pannonian and Dalmatian provinces, which, under the general name of Illyricum, filled the country between the Danube and the Hadriatic, up to ancient Greece: Mœsia, which comprised Servia and Bulgaria: and Dacia, which comprised Temeswar and Transylvania, the only part of the Roman territory beyond the Danube; and Thrace, Macedonia, and Greece, the Roumelia of the Turks.

II. 3. *The Roman conquests out of Europe* reached over Minor Asia, Syria, Phenicia, and Palestine; over Ægypt, as far as Syene; and over the whole northern frontier of Africa. It should be added, that the countries on the northern shores of the Euxine, from the Danube on the west to Trebizond on the east, were tributary to the Romans, received their kings from Rome, and had Roman garrisons.*

III.

THESE were the limits of the Roman empire; her subjects may be classed under the following divisions.

* This article is chiefly extracted from the second chapter of the first volume of Mr. Gibbon's history; the geography of that work is unquestionably entitled to the highest praise.

III. 1. The highest class of subjects was that of Roman citizens, or those who had the *Jus Civitatis.*

At a distance of about fourteen miles from the sea, the city of Rome stands on a cluster of small hills, contiguous to each other, rising out of an extensive plain, washed by the Tiber. At first, it was confined to the Palatine Hill: the Capitol was added to it by Titus Tatius; the Quirinal, by Numa; the Celian, by Tullus Hostilius; the Aventine, by Ancus Martius; and the Viminal and Esquinal by Servius Tullius. The city was surrounded by a wall; a slip of ground, on each side of it, was called the Pomærium; the walls and Pomærium were sacred: whoever extended the limits of the empire, had a right to extend the walls of the city: its last and greatest extension, was in the time of the Emperor Aurelian: he inclosed the Mons Pincius and Campus Martius within its walls. In 850, Pope Leo added to it the Mons Vaticanus. At first, it was divided into four districts or regions; Augustus divided them into fourteen; modern Rome is divided into the same number; but the sites of the ancient and modern districts or regions, considerably differ.

At first, all who fixed their residence in any part of the Roman territory, had the Jus Civitatis, or the rights of Roman citizens: afterwards, the Jus Civitatis was conferred on few, and generally with

with limitations; in the course of time, it was granted to all of the Latin name. After the civil war, it was conferred on all of the inhabitants of Italy, south of the Rubicon and Lucca: then it was granted to the Cisalpine Gaul, which, from this circumstance was called Gallia Togata: finally, Caracalla communicated it to all the inhabitants of the Roman world.

The Jus Civitatis conferred on those, who possessed it, the public rights attending the census, or the right of being enrolled in the censors' books; the Militia, or the right of serving in the army; the Tributa, or the right of taxation; the Suffragium, or the right of voting in the different assemblies of the people; the Honores, or the right of bearing the public offices of the state; and the Sacra, or a right to participate in the sacred rights of the city: it conferred on them the private rights of liberty, family, marriage, parental authority, legal property, making a will, succeeding to an inheritance, and tutelage or wardship.

The citizens of Rome were divided into Patricians or nobles, and Plebeians or inferior persons, and the middle order, called the Equites. At an immeasurable distance beneath the Plebeians, were the slaves: their masters might set them free, they were then called freed-men; but, even after they were set free, their masters retained some rights over them.

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The Romans were divided into gentes or clans; their clans into families; their families into individuals. Each individual had a prænomen, by which he was distinguished from others; a nomen, which denoted his clan; and a cognomen, which denoted his family; sometimes an agnomen was added, to denote the branch of the family to which he belonged. Thus, in respect to Aulus Virginius Tricostus Cœlimontanus,—Aulus, the prænomen, denoted the individual; Virginius, the nomen gentilitium, denoted that he was of the Virginian clan; Tricostus, the cognomen, denoted, that he was of the Tricostan family of that clan; and Cœlimontanus, the agnomen, denoted, that he was of the Cœlimontan branch of that family: sometimes a further name was acquired, as Cunctator by Fabius, and Africanus by Scipio, in consequence of an illustrious deed.

III. 2. Next to the Citizens of Rome, were the Latins, or those who had the *Jus Latii.* Ancient Latium contained the Albani, Rutuli, and Æqui; it was afterwards extended to the Osci, Ausones, and Volsci: the difference between the right of the city and the right of Latium is not precisely ascertained: the principal privilege of the Latins seems to have been, the use of their own laws, and their not being subject to the edicts of the Prætor; and that they had occasional access to the freedom of Rome, and a participation in her sacred rites.

III. 3. The

III. 3. The Italians, or those who had the *Jus Italicum*, followed. All the country, except Latium, between the Tuscan and Hadriatic seas, to the rivers Rubicon and Macra, was, in this sense of the word, called Italy: the Italians had not access to the freedom of Rome, and did not participate in her sacred rites; in other respects, they were nearly on a footing with the Latins.

III. 4. Those countries were called *Provinces*, which the Romans had conquered, or, in any other way, reduced to their power, and which were governed by magistrates, sent from Rome. The foreign towns, which obtained the right of Roman citizens, were called *Municipia*. The cities or lands, which the Romans were sent to inhabit, were called *Coloniæ;* some consisted of Citizens, some of Latins, and some of Italians, and had therefore different rights.

Præfecturæ, were conquered towns, governed by an officer called a Præfect, who was chosen in some instances by the people, in others by the Prætors.

Civitates Fœderatæ, were towns in alliance with Rome, and considered to be free. All who were not Citizens, Latins, or Italians, were called *Peregrini* or foreigners; they enjoyed none of the privileges of Citizens, Latins, or Italians.*

* This article is extracted from the first appendix to *Heineccius's Antiquitatum Romanarum Syntagma;* and *Gravina's work, De Ortu et Progressu Juris Civilis*, and his *Liber singularis*

IV.

SUCH were the limits of the Roman empire, and the different classes of Roman subjects;—with respect to its GOVERNMENT AND FORM OF LEGISLATION.

The ROMAN LAW, in the most extensive import of those words, denotes the system of jurisprudence, by which the Roman empire was governed, from its first foundation by Romulus, to its final subversion in the East, in consequence of the taking of Constantinople by Mahomet II. THE CIVIL LAW denotes that part of the Roman Law, which consists of the body of law, compiled by the orders of the Emperor Justinian, and of the laws subsequently enacted by him, and called his Novells.

The writers on the History of the Roman Law, generally divide it into three æras,—the Jurisprudentia Antiqua, Media, and Nova. The first commences with the foundation of Rome, and extends to the æra of the twelve tables; the

singularis de Romano Imperio: It will be found difficult to mention many works, which a practical lawyer, who wishes to relieve his mind from his professional labours by the perusal of a work of taste, on a subject connected with them, will read with so much pleasure as these three treatises: and from *Spanheim's Orbis Romanus.*

second

second extends to the reign of the emperor Adrian; the third to the reign of the emperor Justinian.

IV. 1. *As it was constituted by Romulus*, the Roman government consisted of an elective King; a Senate or Council, first of one hundred, and afterwards of two hundred nobles; and a general assembly of the people. The command of the army, the administration of Justice, the superintendence of religious concerns, with the office of high priest, belonged to the King; the Senate deliberated on all public business, and prepared it for the people; to them the right of final determination upon it belonged. The number of Senators was successively increased, to three hundred, by Tarquinius Priscus; to six hundred by Sylla; to nine hundred by Julius Cæsar; Augustus reduced it to six hundred. That, during the monarchy, the King had the right of appointing the Senators, is clear: how they were chosen during the æra of the republic, has been the subject of much dispute: some, with M. de Vertot, M. de Beaufort, and Lord Hervey, contend that, as the Consuls succeeded to the royal power, they enjoyed the royal prerogative of filling up the Senate, till the creation of the Censors, to whom it then devolved: others contend, with Dr. Middleton, and Dr. Chapman, that the Kings, Consuls, and Censors, only acted in these elections, ministerially and subordinately to the supreme will of the people;

people; with whom the proper and absolute power of creating Senators always resided.

The people were divided by Romulus into three Tribes, and each tribe into three Curiæ. Their public assemblies were called the *Comitia Curiata:* every member had an equal right of voting at them; and the votes were reckoned by the head. Thus, the issue of all deliberations depended on the poor, as they formed the most numerous portion of the community. To remedy this, Servius Tullius, the sixth King, divided the people into six classes, according to a valuation of their estates, and then subdivided the classes into an hundred and ninety-three centuries, and threw ninety-eight of the centuries into the first class; twenty-two, into the second; twenty, into the third; twenty-two, into the fourth; thirty, into the fifth; and the remaining part of the citizens into the sixth. The first class consisted of the richest citizens; the others followed in a proportion of wealth; the sixth consisted wholly of the poorest citizens. Each century, except the last, was obliged to furnish an hundred men in the time of war; the sixth was exempt from all taxes; and, to compensate this privilege to the rich, Servius enacted that, in the assemblies of the people, they should no longer count the votes by head, but by centuries, and that the first century should have the first vote. This arrangement, while it seemed to give every citizen an equal right of suffrage,

suffrage, as all voted in their respective centuries, virtually gave the richer classes the sole authority: but it was generally acceptable, as it conferred power on the rich, and immunity from taxes and the other burthens of the state, on the poor. These assemblies were called the *Comitia Centuriata*. For some purposes, however, particularly for the choice of inferior magistrates, and, in the time of the republic, for vesting military power in the Dictator, the Consuls, and the Prætors, the Comitia Curiata continued necessary.

On the expulsion of the last Tarquin, the Senate seems to have been permitted to retain, for some time, the constitutional power, under the regal state, of the monarchs whom they had dethroned: and to have used all means within their reach to secure to them the enjoyment of it. During this period, the form of Roman legislation appears to have been, 1st, that the Senate should convene the Assembly, whether of Curiæ, or Centuriæ; 2dly, that the Consul should propound to them the matter to be discussed; 3dly, that the Augur should observe the omens, and declare whether they were favourable or unfavourable;—in the last case the assembly was dissolved; 4thly, that the assembly should vote; 5thly, that the Consul should report the resolution of the people to the Senate; and, 6thly, that the Senate should confirm or reject it.

IV. 2. These were the rights of the Consuls,

the Senate, and the people, at the commencement of the republic; *several alterations successively took place*, in favour of the people, at the expence of the Consuls and the Senate.

With respect to the *Consuls*, their dignity and power were, by degrees, parcelled out among various magistrates: thus their power of deciding in civil matters was assigned to the Prætors; their power of setting criminal prosecutions on foot was assigned to the Questors; their care of the police to the Ediles; their general superintendence of morals and manners to the Censors. After this, little more remained to the Consuls, than their right to assemble the Senate, convene the Comitia, and command the armies of the republic. The Consuls and higher magistrates were chosen by the people; at first, their choice was confined to the Patrician order: after much contest, it was extended to the people.

The influence of the Patricians on the deliberations of the Comitia Centuriata was soon thought a grievance by the people: hence, upon every occasion which offered, they endeavoured to bring the business before the Comitia Curiata: but with this, they were not satisfied; for, as a patrician magistrate only could preside at the Comitia Curiata, and before the assembly proceeded to business, the omens were to be consulted, and none but Patricians were admitted to the rank of Augur, the Comitia Curiata, though in

in a less degree than the Comitia Centuriata, were still subject to Patrician influence. To make the people entirely independent of the Patricians, at their general assemblies, the Tribunes insisted, that the public deliberations should be brought before the assemblies of the tribes, at which every Roman citizen had an equal right to vote, and at which neither the presence of a magistrate, nor the taking of the omens was essential. To this, the Senate and Patricians found it necessary to submit. At first, they contended that they were not bound by the laws passed at these assemblies, but they were soon forced to acknowledge their authority. These assemblies were called the *Comitia Tributa.*

Some important privileges, however, still remained to the *Senate:* they had the direction of all concerns of religion; the appointment of ambassadors, of governors of the provinces, of the generals and superior officers of the army, the management of the treasury; and, speaking generally, they had the direction of all the religious, civil, and military concerns of the state, subject to the control of the people, and subject also to the control of any tribune of the people, who, by his *veto*, might at any time prevent the resolution of the Senate from passing into a decree: but, when the people did not interfere, the Senatus-Consulta generally were obeyed; and it seldom happened that, in matters of weight, the people

people enacted a law, without the authority of the Senate. Thus the constitutional language of ancient Rome was, that the Senate should decree, and the People order. By the senators themselves, it was deemed an heinous offence, that any of their body, without their leave, should propose a measure to the people: but, in the decline of the Republic, the leading men of Rome, and their creatures, paid no attention to this notion, and frequently obtained from the people, what they knew would be refused them by the Senate. The writings of Cicero abound with complaints against this practice. The determination of the people, at the Comitia Centuriata, Comitia Curiata, or Comitia Tributa, was equally *lex*, or a law of the state; but when it passed in the Comitia Tributa, as it originated with the people, it was called *plebiscitum:* the decrees of the Senate, were called *Senatus-Consulta.*

IV. 3. *The laws were distinguished,* sometimes by the name of the person who proposed them, as the law Æmilia: sometimes, by the names of the Consuls, if they were proposed by both the Consuls, as the law Papia Poppæa: and sometimes, a mention of the nature of the law was added, as the Lex Fannia Sumptuaria.*

FOR

* See *M. de Beaufort, La Republique Romaine; Paris,* 1767, 6 *vol.* 8vo. *Letters between Lord Hervey and Dr. Middleton*

V.

FOR obtaining an exact view of the HISTORY OF THE ROMAN LAW, it may be divided into nine periods, severally beginning with the following epochs; 1st, the foundation of Rome; 2d, the Twelve Tables; 3d, the abolition of the Decemvirs; 4th, the reign of Augustus; 5th, the reign of Hadrian; 6th, the reign of Constantine the Great; 7th, the reign of Theodosius the Second; 8th, the reign of Justinian; 9th, the reign of his successors, till the fall of the Empire of the East; and 10th, the revival of the study of the civil law, in consequence of the discovery of the Pandects at Amalphi. A short view should be had of the principal schools in which the civil law has been taught, and a short account of its influence on the jurisprudence of the modern states of Europe.

Before Christ. | Anno Urbis Condit.

V. 1.

V. 1. THE FIRST OF THESE PERIODS contains the state of Roman jurisprudence from the foundation of Rome, till the æra of the Twelve Tables. As

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Middleton concerning the Roman Senate; London 1778, 4*to*, *and the* 12, 13, 14 *and* 15 *Chapters of Montesquieu, l.* 11.

Rome

Rome was a colony from Alba, it is probable that her laws originated in that city. Several of them are actually traced to her first kings; particular mention is made of laws enacted by Romulus, Numa, and Servius Publius. Historians ascribe to Romulus the primitive laws of the Romans, respecting marriage, the power of the father over his child, and the relation between patron and client: to Numa, their primitive laws, respecting property, religion, and intercourse with foreign states; to Servius Tullius, their primitive laws respecting contracts and obligations. It is supposed that, in the reign of the last of these kings, a collection of their laws was promulgated by public authority. The scanty materials which have reached us, of the regal jurisprudence of Rome, lead to a conjecture that the Romans had attained a high degree of legislative refinement before the abolition of royalty.

Before Christ. An Ur Co

Tarquin, the last king of Rome, was expelled in - - - - 509

Not long before or after his expulsion, a body of the Roman law, as it then stood, was collected by Papyrian, and from him was called *Jus Civile Papyrianum.* The president Terrasson, in his Histoire de la Jurisprudence Romaine, Paris, 1750, in folio,

folio, p. 22—73, professes to restore the original of this compilation, as far as the materials, which have reached us, allow: he has given us thirty-six laws, fifteen of them as original texts, twenty-one as the substance or sense of texts which are lost.

Before Christ. Anno Urbis Conditæ

V. 2.

THE SECOND PERIOD OF THE HISTORY OF THE ROMAN LAW is, the æra of the Twelve Tables.

During the first half century which followed the expulsion of the Tarquins, the civil government of the Romans was in great confusion: on their expulsion, much of the ancient law was abrogated or fell into disuse, and some new laws were enacted by the Consuls.

The arbitrary and undefined power of the Consuls in framing laws growing very odious, three persons were sent into Greece, and probably to some of the most civilized states of Magna Græcia or Lower Italy, to obtain copies of their laws and civil institutions. - - - - - - - 453 301

They returned in the third year after their mission. Ten persons, called from their number Decemvirs, were then appointed to form a code of law for the government

vernment of the state, both in private and public concerns. This they effected, and divided their code into ten distinct tables: two were added to them in the following year. They were a mixture of the laws of other nations, and of the old Roman law, adapted to the actual circumstances of the state of the people. - - - - - 451

Before Christ.

They were inscribed on twelve tablets of brass; and, from that circumstance, were called the *Laws of the Twelve Tables*. The twelve tablets were exposed to the view of every person, in a public part of the market place. In the sack of Rome, by the Gauls, they perished: immediately after the expulsion of the Gauls, they were restored, and the whole text of them was extant in the time of Justinian: fragments only of them have reached us. Gothofred's edition of these fragments, in his work intituled *Fontes Quatuor Juris Civilis*, Geneva, 1653, in octavo, has obtained the universal applause of the learned: the fragments of them have also been published by the president Terrasson; and Pothier has inserted them in his Pandectæ Justinianeæ, with an interpretation, and an excellent commentary.

The legislative wisdom of the Twelve Tables has been highly praised; but it has been

been thought, in some instances, immoderately severe. Thus, in respect to an insolvent debtor—after the debt was proved or admitted, they allowed him thirty days to raise the money, or find surety for the payment of it: at the end of the thirty days, the law delivered him into the power of his creditor, who might confine him for sixty days in a private prison, with a chain of fifteen pounds weight, on a daily allowance of fifteen pounds of rice: during the sixty days, he was to be thrice exposed in the market-place, to raise the compassion of his countrymen: at the end of sixty days, if he was sued by a single creditor, the creditor might sell him for a slave beyond the Tyber; if he was sued by several, they might put him to death, and divide his limbs among them, according to the amount of their several debts. Nothing can be urged in defence of this savage provision, if, as appears to be its true construction, [a] the division, which it directs to be made, is to be understood literally of the body, and not of the price of the debtor: but if, before the Twelve Tables, an insolvent debtor became the slave of the creditor, so that his liberty and life were immediately in the power of the creditor, the ultimate severity of the provisions of the Twelve Tables should be ascribed to the harsh spirit of the people, and the intermediate delays in favour of the debtor should be ascribed to the humane policy of the Decemvirs. It may be added, that,

[a] See on this subject Bynkershoek *Observat. Jur. Roman.* Book 1. ch. 1. where this question is discussed in a very interesting manner.

about two hundred years afterwards, the Petilian law provided that the goods, and not the body of the debtor, should be liable to his creditor's demands; and, at a subsequent period, the Julian law provided, in favour of the creditor, the Cessio Bonorum, by which the debtor, on making over his property to his creditors, was wholly liberated from their demands. [*b*] Upon the whole, if we consider the state of society, for which the laws of the Twelve Tables were formed, we shall find reason to admit both their wisdom and their humanity.

The journey of the Decemvirs into Greece has been questioned by M. Bonamy, Mem. de l'Academie, 12 vol. p. 27, 51, 75; and his doubts have been adopted by Mr. Gibbon; but the fact is either related or alluded to by almost every Roman author, whose works have come down to us: and some writers have professed to track the jurisprudence of Greece, even in the legislative provisions of the Prætors, Consuls and Emperors.

V. 3.

V. In proportion as Rome increased in arms, arts, and the number of her citizens, the insufficiency of the laws of the Twelve Tables was felt, and new laws were passed. This insensibly produced, during the remaining part of the period of

[*b*] The *cessio bonorum* or *cessio miserabilis*, was indeed established at Rome by the Julian law, but it did not, as our learned author supposes, wholly liberate the debtor from his creditor's demands. It merely freed his person from imprisonment,

of the republic, which forms THE THIRD PERIOD OF THE HISTORY OF THE ROMAN LAW, that immense collection of laws, from which the civil law, as the Justinianean body of law is called, was extracted, and which, on that account, deserves particular consideration.

It was divided, like the law of Greece, into the written and unwritten law. The written comprehended the Leges, Plebiscita, and Senatus-Consulta, which have been mentioned.

1. The first, and most important branch of the unwritten law of Rome was the *Jus Honorarium*, the principal part of which was the *Edictum Prætoris*. During the regal government of Rome, the administration of justice belonged to the king: on the establishment of the republic, it devolved to the Consuls, and from them to the Prætor. At first, there was but one Prætor; afterwards, their number was increased to two; the Prætor Urbanus, who administered justice among citizens only; and the Prætor Peregrinus, who administered justice between citizens and foreigners, or foreigners only: the number of Prætors was afterwards increased, for the administration of justice in the provinces and colonies. When the Prætor entered on his office he published an edict, or system of rules, according to which he professed to administer justice for that year. In consequence of his often altering his edicts, in the course of the year, laws were passed, which enjoined

sonment, and the property which he afterwards acquired, was liable to the payment of his debts, as it is under our Pennsylvania Insolvent Law. It is clear that it was so from the express words of the code: *Qui bonis cederint, nisi solidum creditor*

joined him not to deviate from the form, which he should prescribe to himself, at the beginning of his office. All magistrates who held the offices, which were ranked among the honours of the state, had the same right of publishing edicts; and, on this account, that branch of the law, which was composed of the edict of the Prætor, and the edicts of those other magistrates, was called the Jus Honorarium: but the edicts of the Prætor formed by far the most important part of this branch of the Roman law. Such were his rank and authority in Rome, and such the influence of his decisions on Roman jurisprudence, that several writers on the Roman law mention his edicts in terms, which seem to import that he possessed legislative, as well as judicial power; and make it difficult to describe with accuracy, what is to be understood by the Prætor's edict. Perhaps the following remarks on this subject will be found of use, and show an analogy between some parts of the law of which the honorary law of Rome was composed, and some important branches of the law of England.—1st. By the Prætor's edict, as those words apply to the subject now under consideration, civilians do not refer to a particular edict, but use the words to denote that general body of law, to which the edicts of the Prætors gave rise.—2dly. It is to be observed, that the legislative acts of any state, form a very small proportion of its laws: a much greater

ditor receperit, non sunt liberati. In eo enim tantum modo hoc beneficium eis prodest, ne judicati detrahentur in carcerem. "Those who have made a cession of their property (*cessio bonorum*) are not discharged from their debts unless their creditors

greater proportion of them consists of that explanation of the general body of the national law, which is to be collected from the decisions of its courts of judicature, and which has, therefore, the appearance of being framed by the courts. A considerable part of the law, distinguished by the name of the Prætor's edict, was of the last kind; and, as it was a consequence of his decisions, received the general name of his law. In this respect, the legal policy of England is not unlike that of Rome; for, voluminous as is the statute book of England, the mass of law it contains bears no proportion to that which lies scattered in the volumes of reports, which fill the shelves of an English lawyer's library: and perhaps it would be difficult to find, in any edict of a Prætor, a more direct contradiction of the established law of the land, than the decisions of the English judges, which, in direct opposition to the spirit and language of the statute de donis, supported the effect of common recoveries in barring estates tail.—3dly. Experience shews, that the provisions of law, on account of the general terms, in which they are expressed, or the generality of the subjects to which they are applicable, have frequently an injurious operation in particular cases, and that circumstances frequently arise, for which the law has made no provision. To remedy these inconveniences, the courts of judicature of most countries, which

creditors are paid in full. The only benefit which they derive from it, is that after judgment, they cannot be thrown into prison." *Cod. B. 7. Tit. 71. l. 1.* The same doctrine is laid down in the digest: *Is qui bonis cessit, si quid postea*

which have attained a certain degree of political refinement, have assumed to themselves a right of administering justice in particular instances, by certain equitable principles, which they think more likely to answer the general ends of justice, than a rigid adherence to law; and, where law is silent, to supply its defects by provisions of their own. These privileges were allowed the Prætor by the law of Rome; in virtue of them, he pronounced decrees, the general object of which had sometimes a corrective, and sometimes a suppletory operation on the subsisting laws. They were innovations; but it may be questioned, whether any part of the Prætor's law was a greater innovation on the subsisting jurisprudence of the country, than the decisions of English courts of equity on the statute of uses and the statute of frauds.—4thly. The laws of every country allow its courts a considerable degree of power and discretion in regulating the forms of their proceedings, and carrying them into effect; further than this, the Prætor's power of publishing an edict, signifying the rules by which he intended the proceedings of his courts should be directed, does not appear to have extended.—These observations may serve to explain the nature of the Prætor's jurisdiction, and to shew that the exercise of his judicial authority was not so extravagant or irregular as it has sometimes been described.*

* See Appendix, Note III.

2. A second

postea adquisierit, in quantum facere potest, convenitur. "If he *who* has made a *cessio bonorum* should afterwards acquire any *property, he* may be sued and compelled to pay to the extent *of his means.*" *Dig. B.* 42. *Tit.* 3. *l.* 4.

When

2. A second source of the unwritten law of Rome was, the *Actiones Legis*, and *Solemnes Legum Formulæ*, or the Actions at Law, and Forms of Forensic proceedings, and of transacting legal acts. These, for some time, were kept a profound secret by the Patricians; but, Appius Claudius having made a collection of them for his private use, it was published by Cnæus Flavius, his secretary. The Patricians then devised new forms, and those were made public by Sextus Ælius. These publications were called the Flavian and Ælian Collections; all we have of them is to be found in Brisson's celebrated work, De Formulis et Solemnibus Populi Romani Verbis.

3. A third source of the unwritten law of Rome was derived from the *Disputationes Fori*, and the *Responsa Prudentum*. Mention has been made of the relation introduced by Romulus between patron and client;—to give his client legal advice was among the duties of the patron; insensibly, it became a general practice, that those, who wanted legal assistance, should apply for it to the persons of whose legal skill they had the greatest opinion. This was the origin of the Jurisconsulti or Civilians of Rome; they were, generally, of the Patrician order; and, from succeeding to this branch of the duty of patronage, received the name of patrons, while those, by whom they were consulted, were called clients. The patron received his client with a solemnity

When a person applied for the benefit of the Julian Law, the creditors had their election either to grant to the insolvent a letter of licence for five years, or to take a general assignment of all his property on condition that he should not be

solemnity bordering on magisterial dignity; and generally delivered, in a few words, his opinion on the case which was submitted to his consideration; but he sometimes accompanied it with his reasons. These consultations usually took place at an early hour in the morning: the broken slumbers of the Civilians are mentioned by every Roman poet whose muse has led him to describe the inconveniences which attend distinction and fame. Legal topics were often subjects of the conversations of Civilians; and the forum, from their frequent resort to it, being the usual scene of these friendly disputations, gave its name to them. They also published treatises on legal subjects. Their opinions and legal doctrines were highly respected; but, till they were ratified by a judicial decision, they had no other weight than what they derived from the degree of public estimation, in which the persons who delivered them were held. The Civilians are commonly divided into three classes; those, who flourished between the æra of the Twelve Tables, and the age of Cicero; those who flourished from the age of Cicero, to the reign of Severus Alexander; and those who flourished from the beginning of his reign, to that of the Emperor Justinian. The second, is the golden period of Antejustinianean jurisprudence. From the fragments which have reached us, of the works of the Civilians who flourished during that period, modern writers have thought themselves justified in describing

be imprisoned, *semoto omne corporis cruciatu.* Cod. B. 7. Tit. 7. l. 8.

scribing them as men of enlarged minds, highly cultivated understandings, and great modesty. In their judicial studies they availed themselves of the learning and philosophy of the Greeks, carried the disputes of the schools of Athens into the Forum; and, early in the period we are speaking of, branched into two sects, whose opposite tenets were founded on principles, not unlike those, which gave rise to the distinctive doctrines of the disciples of Zeno and Epicurus. Antistius Labeo was the founder of the former sect; Ateius Capito of the latter: from Proculus and Pegasus, two eminent followers of Labeo, the former were called Proculeians or Pegasians; from Masurius Sabinius and Cassius Longinus, two eminent followers of Capito, the latter were called Sabinians or Cassians. The former contended for a strict adherence to the letter and forms of the law; the latter for a benign interpretation of it, and for allowing great latitude in the observance of its forms. Attempts were made to compromise the difference between them: they gave rise to a third sect, the Jurisconsulti erciscundi or miscalliones. Something of the difference which subsisted between the disciples of Labeo and Capito, has long subsisted in the jurisprudence of England; but the good sense of the English bar has prevented the maintainers of the different opinions from forming themselves into sects. Till the reign of Augustus every

person was at liberty to deliver judicial opinions; Augustus confined this privilege to particular persons, with a view, it is supposed, of their propagating those doctrines of law, which were favourable to his political system: the Emperor Adrian restored the general liberty; the Emperor Severus Alexander assigned it the limits within which it had been circumscribed by Augustus.

These are the materials of which the written and unwritten law of Rome was principally formed.

V. 4.

THE FOURTH PERIOD OF THE HISTORY OF THE ROMAN LAW, is that which fills the space between the time when Julius Cæsar was made perpetual Dictator, and the reign of the Emperor Adrian. The power of Julius Cæsar, in consequence of his perpetual dictatorship, placed him above law; but it does not appear that he made many innovations, of a general nature, in the Roman jurisprudence. That was left to Augustus, his heir and successor. At different periods of his reign, the people conferred on Augustus the various titles of Perpetual Tribune, Consul, Proconsul, Censor, Augur, and

Before Christ.	Anno Urbis Conditæ.
46	708

and High Priest: thus, in effect, he acquired both the civil and military power of the state; but, as he professed to exercise it in virtue of those offices, his acts had the appearance of being the acts of the different magistrates, whose offices had been conferred on him. Finally, in the year of the city, 735, power was given him to amend or make whatever laws he should think proper. This was the completion of the Lex Regia, or of those successive laws, which, while they permitted much of the outward form of the republic to remain, invested the the emperor with absolute power.

Before Christ 16 | Anno Urbis Conditæ 735

During the whole of Augustus's reign, the forms of the Leges and Senatus-consulta, those vestiges of dying liberty, as they are called by Tacitus, were preserved.

For the Senate, Augustus uniformly professed the greatest deference; he attended their meetings, seemed to encourage their free discussion of every subject, which came before them; and, when a law was approved of by them, he permitted it, agreeably to the ancient forms of the republic, to be referred to the people. The reference of laws to the people was abolished by Tiberius; so that, from his time, the laws of Rome originated and were completed in the Senate. At first their deliberations had an

appearance

appearance of free discussion; by degrees, even that vanished, and insensibly the Senate served for little more than a nominal council of the Emperor, an office to register his ordinances, and a court of judicature for great public causes.

V. 5.

THIS memorable revolution in the functions of the Senate, with which even the forms of Roman liberty expired, must be dated from the Emperor Adrian, and forms the FIFTH PERIOD OF THE HISTORY OF THE ROMAN LAW. He was the first of the Emperors who exercised, without disguise, the plenitude of legislative power. With him therefore, the *Imperial Constitutions*, under the various names of Rescripta, Epistolæ, Decreta, Edicta, Pragmaticæ Sanctiones, Orationes and Annotationes, originated; they had the force of law in every part of the Roman state. Under his reign, Julian, a lawyer of great eminence, digested the Prætor's edicts, and other parts of the Jus Honorarium, into a regular system of law, in fifty books. This compilation was much esteemed; it was referred to as authority, and obtained the title of *Edictum Perpetuum;* all the remains of it, which have come down to us, are the extracts of it in the digest; they have been collected with great attention, by Simon

Simon Van Leeuwen, at the head of the Digest, in his edition of Gothofred's Corpus Juris Civilis, Lugd. Batav. 1663. - - 120 After Christ.

It was a remarkable effect of the Edictum Perpetuum, to put an end to the legal schism of the Sabinians and Proculeians. By countenancing the former, in the dictum Perpetuum, the Emperor Adrian terminated the dispute.

After this came the *Codex Gregorianus;* a collection of imperial constitutions, from Adrian to Dioclesian, by Gregorius or Gregorianus, Prætorian Præfect to Constantine the Great. 284

This was succeeded by the *Codex Hermogenianus*, a continuation of the former code, by Hermogenes, a contemporary of Gregorius or Gregorianus.

V. 6.

THE SIXTH PERIOD OF THE ROMAN LAW extends from the reign of Constantine the Great to that of the Emperor Theodosius the Second. It is particularly remarkable for having furnished many new articles of great importance to the jurisprudence of Rome. - 306

They chiefly arose from the foundation of Constantinople, the new forms of civil and military government introduced by Constantine, the legal

legal establishment of Christianity, and the division of the empire between the sons of Theodosius the Great. To the first may be referred numerous laws, respecting the privileges and police of the imperial city; to the second, an abundance of legal provisions, respecting the various officers of the empire, and the ceremonial of the Byzantine court; to the third, a succession of imperial edicts, by which Christianity was first tolerated, then legalized, and afterwards became the established religion of the state. After Christ.

The division of the empire between the sons of Theodosius, in 395, was attended with still more important effects on Roman jurisprudence. 395

V. 7.

THE variety of laws, principally occasioned by the circumstances which have been mentioned, introduced a considerable degree of confusion into the Roman jurisprudence. To remedy it, Theodosius the Second, the Emperor of the East, published, in 438, the celebrated code of law, called from him the *Theodosian Code*, which forms THE SEVENTH PERIOD OF THE HISTORY OF THE ROMAN LAW. It comprises all the imperial constitutions from 312, the year in which Constantine was supposed to have embraced Christianity, to the time of its publication. It 438 has

has not reached us entire: an excellent edition of the remains of it was published by James Gothofred, at Lyons, in 1668, in six volumes folio, generally published in four. It is accompanied with Prolegomena, introductory chapters, a perpetual commentary and notes; the labour of thirty years; and no one, as Dr. Jortin justly remarks, ever thought the time thrown away. No work perhaps can be mentioned, which contains more information on the antiquities of the early ages of the lower empire. In addition to the Theodosian Code, it comprises the subsequent novells of the Emperors Valentinian, Martian, Majorian, Severus and Anthemius. After Christ.

Immediately after the publication of the Theodosian Code in the eastern empire, it was received into the empire of the west, by an edict of Valentinian the Third. In the east, it retained its force till it was superseded by the Justinianean collection.

It retained, but indirectly, its authority longer in the west. The Barbarians, who invaded the empire, permitted the Romans to retain the use of their laws. In 506 Alaric, king of the Visigoths in Gaul, ordered a legal code to be prepared, in which the Roman and Gothic laws and usages should be formed into one body of law, for the general use of all his subjects; this was accordingly done in the twenty-second year of his reign; and from Anianus, his Referendary, or Chancellor, by 506

by whom it was either compiled or published, it was called the *Breviarium Aniani*. It is an extract from the Gregorian, Hermogenian, and Theodosian Codes, the novells of the subsequent Emperors, the sentences of Paullus, the Institutes of Gaius, and the works of Papinian. It superseded the use of the former laws so far, that, in a short time, they ceased to be cited in the courts, or by writers on subjects of law; and Anianus's collection, under the name of the Roman or Theodosian law, became the only legal work of authority.

To this period also, must be ascribed the celebrated *Collatio Mosaicarum et Romanarum Legum:* the object of it is to shew the resemblance between the Mosaical institutions and the Roman law: the best edition of it is F. Desmare's in 1689.

V. 8.

THE EIGHTH, AND MOST IMPORTANT, PERIOD, of the history of the Roman law, comprises the time in which the body of law, compiled by the direction of the Emperor Justinian, was framed.

1. By his order, Trebonian, and nine other persons of distinction, in the first year of his reign, made a collection of the most useful laws, in the Codex Theodosianus, the two earlier codes of

of Gregorius and Hermogenes, and the constitutions of some succeeding emperors. It was immediately published by Justinian, and is called the *Codex Justineaneus Primæ Prælectionis.* - 528 Before Christ.

2. But his great work is his *Digest or Pandects.* By his direction, Trebonian, with the assistance of sixteen persons, eminent either as magistrates or professors of law, extracted from the works of the former civilians, a complete system of law, and digested it into fifty books. - - - - - 533

3. Previously to its publication, an elementary treatise, comprising the general principles of the system of jurisprudence, contained in it, was promulgated, by the Emperor's direction, in four books. From its contents, it was called *The Institutes.*

Thus the Digest, and Institutes were formed into a body of law, by the authority of the Emperor. He addressed them, as imperial laws, to his tribunals of justice, and to all the academies, where the science of jurisprudence was taught: they were to supersede all other law, and to be the only legitimate system of jurisprudence throughout the empire.

4. In the following year, he published a corrected edition of the code, under the title *Codex Repetitæ Prælectionis.* This wholly superseded the first code; and, except so far as it has been preserved in the latter, it is wholly lost. - 534

5. The edicts which he promulgated, after the new edition of the Codex, were collected into one volume, in the last year of his reign, and published under the name of *Novellæ*. - - - - 566 After Christ.

6. Most of the Novellæ were written in the Greek language. In the last year of Justinian's life, a Latin translation was made of them; and, by the fidelity with which it was executed, obtained the appellation of the *Volumen Authenticum*. - - - - - - - - - 568

Other translations of the Novellæ have appeared: that, published at Marburgh, in 1717, by John Frederick Hemburgh, has the character of being extremely well executed, and is accompanied with a valuable commentary and notes.

7. In most editions of the Corpus Juris Civilis, the novells are followed by the *books of Fiefs*, *the Constitutions of Conrade the Third*, *and the Emperor Frederic*, under the title of *Decima Collatio*, and some other articles. But they make no part of what is called the Corpus Juris Civilis: that consists solely of the Pandects, the Institutes, the Codex Repetitæ Prælectionis and the Novells.

8. On the *general merit of Justinian's Collection*, as a body of written law, able judges have differed: the better opinion seems to be that it is executed with great ability, but that it is open to much objection, the Responsa Prudentum sometimes being unfaithfully given in it, contradictory doctrines having found their way into it, its style being

being often too flowery, and its innovations on the old law, sometimes being injudicious. Heineccius, whose testimony, in this case, is of the greatest weight, at first judged of it unfavourably: but afterwards changed his opinion: he mentions, in high terms of commendation, the defence of it by Huberus and the Cocceii, and asserts that the cause must now be considered as decided in its favour. Hist. Juris Romani, Lib. I. § cccc.

The very attempt to lessen, by legislative provisions, the bulk of the national law of any country, where arts, arms and commerce flourish, must appear preposterous to a practical lawyer, who feels how much of the law of such a country is composed of received rules and received explanations. What could an act of the Imperial Parliament substitute in lieu of our received explanations of the rule in Shelly's Case? The jurisprudence of a nation can only be essentially abridged by a judge's pronouncing a sentence which settles a contested point of law, on a legal subject of extensive application, as Lord Hardwicke did by his decree in the case of Willoughby versus Willoughby; or by a writer's publishing a work on one or more important branches of law, which, like the Essay on Contingent Remainders, has the unqualified approbation of all the profession.

One circumstance, however, may be urged, as an unquestionable proof of the Justinianean Collection's

lection's possessing a very high degree of intrinsic merit. Notwithstanding the different forms of the governments of Europe, and the great variety of their political and judicial systems, the civil law has obtained either a general or partial admittance into the jurisprudence of almost all of them: and, where it has been least favourably received, it has been pronounced a collection of written wisdom: this could not have happened, if it had not been deeply and extensively grounded on principles of justice and equity, applicable to the public and private concerns of mankind, at all times, and in every situation.

V. 9.

9. THE fate of this venerable body of law, promulgated with so much pomp, and possessing so much intrinsic merit, is singular, and forms THE NINTH PERIOD OF THE HISTORY OF THE ROMAN LAW. The reign of the third successor of Justinian, was the last, in which it maintained its authority in the west. After that time, all law and regular government were rapidly destroyed by the Barbarians who invaded and overturned the Roman empire. The exarchate of Ravenna, the last of their Italian victories, was conquered by them in 753; and that year is assigned as the æra

æra of the final extinction of the Roman law in Italy. - - - - - - After Christ. 753

It lingered longer in the east: in strictness even, it cannot be said to have wholly lost its authority, in that part of the empire, till the taking of Constantinople, by Mahomet the Second. In the lifetime of Justinian, the Pandects were translated into Greek by Thaleleus; a translation of the Code was made, perhaps by the same hand, and the Institutes were translated by Theophilus.

The successors of Justinian published different laws, some of which have reached us. In the reign of Basilius the Macedonian, and his sons Leo the philosopher, and Constantine Porphyrogeneta, an epitome, in sixty books, of Justinian's Code, and of the constitutions of succeeding emperors, was framed, under the title of *Basilica.* 906
Forty-one of the sixty books were splendidly published by Fabrotti, at Paris, in 1647, in seven tomes in folio; four more have been published in Meerman's Thesaurus.

That the Basilica superseded, in the eastern empire, the immediate authority of the Justinianean collection, is true; but that the Justinianean collection formed a considerable part, and was in fact the ground-work of the Basilica, is unquestionable. Thus, through the medium of the Basilica, the code of Justinian, in a great degree, directed or influenced the jurisprudence of

of the eastern empire, to the latest moment of its existence.* Aft Chr 1

V. 10.

THE text of the Pandects being almost wholly lost, accident led, sometime about the year 1137, to the discovery of a complete copy of them, at Amalphi, a town in Italy, near Salerno. This forms the TENTH PERIOD OF THE HISTORY OF THE ROMAN LAW. From Amalphi the copy found its way to Pisa, and Pisa having submitted to the Florentines, in 1406, the copy was removed in great triumph to Florence. By the direction of the magistrates of the town, it was immediately bound, in a superb manner, and deposited in a costly chest. This copy of it is generally called the Florentine Pandects. Formerly they were shewn only by torch light, in the presence of two magistrates, and two Cistercian monks, with their heads uncovered. They have been successively collated by Politian, Bolognini, and Antonius Augustinus; an exact copy of them was published, in 1553, by Franciscus Taurellus; for its accuracy and beauty, this edition ranks high among the ornaments of the press: it should be accompanied, with the treatise of Antonius Augustinus, on the proper names in the Pandects, published by him at Tarragona, in 1579. About the year 1710,

* See Appendix, Note IV.

Henry

Henry Brenchman, a Dutchman, was permitted, at the earnest solicitation of our George the First, to collate the manuscript. He employed ten years upon it, and in the investigation of various topics of literature connected with the Justinianean Code. His elegant and curious Historia Pandectarum, published at Utrecht, in 1712, gives an interesting account of his labours; and shews, like the labours of Wetstein and Mill, that great fire of imagination, exquisite taste, minute and patient investigation, and the soundest judgment, may be found in the same mind.—Some have supposed that the Florentine manuscript, is the autograph of the Pandects; for this opinion there is no real ground or authority; but Brenchman refers it to the sixth century, a period not very remote from the æra of Justinian. Brenchman's work forms a small part of an original design, and is so ably executed that all must lament his having left any part of his design unfinished.

Three editions of the Pandects are particularly distinguished: the Norican edition published by Holoander, at Neuremburgh, in 1529, in three volumes, quarto; the Florentine, published by Taurellus, at Florence, in 1553, in two volumes folio, often bound in three; and the Vulgate, under which name every edition is comprised, which is not taken from the Norican or Florentine edition. The best editions for general use appear

appear to be Pothier's Pandectæ Justinianeæ, published at Lyons in 1782, in three volumes folio; and that of Dionysius Gothofred, published by Simon Van Leeuwen at Leyden in 1663, in one large volume, generally bound in two: It contains the Institutes, the Digest, the Code, the Fasti Consulares, Freher's Chronologia Imperii Utriusque, Gothofred's Epitome of the Novells of Justinian, various other edicts and novell constitutions, Frederici II. Imp. Extravagantes, Liber de Pace Constantiæ, Gothofred's Epitome of the books of the Fiefs, an extensive synopsis of Civil Law, the fragments of the Twelve Tables, the Tituli of Ulpian, and the opinions of Paulus, with notes, and copious indexes to the whole.*

THESE

* This article is extracted from *Pomponius's short treatise de Origine Juris et omnium magistratuum et successione prudentum, Dig. Tit.* 2.; *the Preface to the Institutes; the first, second, and third Prefaces to the Pandects; the first and second Prefaces to the Code; Heineccius's Historia Juris Civilis Romani ac Germanici, Lug. Bat.* 1740, 8*vo*; *the Antiquitatum Romanarum Syntagma, of the same author, Strasburgh* 1724, 8*vo*.—The writings of Heineccius are a striking proof of the truth of Mr. Gibbon's observation, vol. 4. 395, note 160, "that the universities of Holland "and Brandenburgh, in the beginning of the last century, "appear to have studied the civil law on the most just and "liberal principles:"—*the works of Gravina, on the Civil Law, Leipsiæ* 1717, *in three volumes* 4*to*, *particularly his Origines Juris Civilis;* Gravina's account of the Leges and

VI.

THESE lead to an inquiry respecting THE PRINCIPAL SCHOOLS IN WHICH THE CIVIL LAW HAS BEEN TAUGHT since its revival in Europe.

In the early days of the republic, it was usual for such as desired to gain a knowledge of the laws of their country, to attend on those, who were

and *Senatus Consulta* is particularly interesting: *Brunquellus's Historia Juris Romano-Germanici, Ams.* 1730, 8*vo*, perhaps the completest historical account extant of the civil law; *Struvius's Historia Juris Romani, Jenæ*, 1718, 4*to*; *Pothier's Prolegomena* to his *Pandectæ Justinianeæ, Lyons*, 3 *vols. fol.*; *Terrasson's Histoire de la Jurisprudence Romaine, Paris*, 1750, said by Mr. Gibbon, 4th vol. note 9, to be "a work of more promise than performance;" *Thomasius's Delineatio Historiæ Juris Romani et Germanici, Erfordiæ*, 1750, 8*vo*; *and his Nævorum Jurisprudentiæ Romanæ Libri duo, Halæ Magdeburgicæ*, 1707, 8*vo*;—they contain a severe attack on the Justinianean collection, the emperor, and all other persons concerned in it: *Montesquieu's Esprit des Loix*, a work entitled to all the praise it has received; no one, who has not travelled through the Corpus Juris and the Capitularies, can form an idea of the comprehensive brevity and energy with which it is written. *Dr. Bever's History of the Legal Polity of the Roman State, Lond.* 1781, 4*to*; *Dr. Taylor's Elements of the Civil Law, Camb.* 1755, 4*to*, a work, if we acquiesce in Mr. Gibbon's opinion of it, 4th vol. note 132, "of amusing, though various reading;

were consulted on legal subjects, at the hours, in which these consultations generally took place. Tiberius Coruncanius is said, by Cicero, to have been the first among the Romans, who professed to give regular instructions on legal subjects. Afterwards, public schools of jurisprudence were established; the most celebrated were those at Rome and Constantinople; Justinian founded a third at Berytus, and used all means in his power, to promote its success: he gave the professors large salaries, and advanced some of them to offices of high distinction in the state;—as the authority of his law decreased, they fell into decay.

With the discovery of the Pandects at Amalphi, the study of the civil law revived: it was introduced into several universities, and exercises were performed, lectures read, and degrees conferred in

"but which cannot be praised for philosophical precision;" *The four Books of Justinian, translated by the late Dr. Harris, with notes and a preface;* the translation is excellent, and it is much to be lamented, that the preface is not longer, and the notes more copious; *Ferriere's Histoire du Droit Romaine, Paris*, 1783, 8*vo; Beaufort's Republique Romaine, Paris*, 1767, 6 *vols.* 8*vo;* an excellent constitutional history of the Roman Government: *The 44th Chapter of the 4th Volume of Mr. Gibbon's History; M. Bouchaud's Recherches Historiques sur les Edits des Magistrats Romains, Quatrieme Memoire, Mem. de l'Academie*, 41st *Vol. p.* 1. *and Mr. Schomberg's Elements of Roman law, London*, 1786, 8*vo.*

this,

this, as in other branches of science, and several nations of the continent; adopted it, as the basis of their several constitutions. From this time, there has been a regular succession of civil lawyers, distinguished by some circumstance or other into different classes, or as it is usually expressed, into different schools.

1. The first, is *the school of Irnerius*, a learned German, who had acquired his knowledge of the civil law, at Constantinople. He taught it at Bologna, with great applause: the legal schism which had divided the Sabinians and Proculeians, was revived, in some degree, among his scholars: one of them, was the celebrated Azo, a Proculeian, whose writings, Montesquieu is said to have preferred to all other on the subject of civil law. A more important subject, the contest between the emperors and popes, produced a more serious warfare among the disciples of Irnerius. The German emperors, who pretended to succeed to the empire of the Cæsars, claimed the same extent of empire in the west, and with the same privileges, as it had been held by the Cæsars; to this claim, the spirit and language of the civil law being highly favourable, the emperors encouraged the civilians; and, in return for it, had their pens at command. The popes were supported by the canonists, and the canonists found, in the decree of Gratian, as much to favour the pretensions of the popes, as the civilians

civilians found, in the law of Justinian, to favour the pretensions of the emperors. Thus, generally speaking, the civilians were Ghibelins, the name given to the partisans of the emperors, and the canonists were Guelphs, the name given to the partisans of the popes. But this distinction did not prevail so far, as to prevent many canonists from being Ghibelins, or many civilians from being Guelphs; those among the civilians, who sided with the canonists in these disputes, were called, from the decree of Gratian, Decretistæ, in opposition to the rest of the body, who assumed the appellation of Legistæ, from their adherence to the supposed Ghibelin doctrines of the civil law.

2. *A new school began with Accursius:*—his Gloss is a perpetual commentary on the text of Justinian: it was once considered as legal authority, and was therefore usually published with the text: it is even now respected as an useful commentary. Accursius had many disciples, whose glosses had great celebrity in their day, but are now wholly forgotten.

3. *Bartolus, and Baldus his disciple and rival, gave rise to a new school*, famous for copious commentaries on Justinian's text; for the idle subtleties with which they abound, and their barbarous style.

4. Andrew Alciat was the first who united the study of polite learning and antiquity, with the study

study of the civil law: he was the founder of a *new school which is called the Cujacian* from Cujas, the glory of civilians. Of him it may be said truly, that he found the civil law of wood, and left it of marble. That school has subsisted to the present time; it has never been without writers of the greatest taste, judgment and erudition; the names of Cujacius, Augustinus, the Gothofredi, Heineccius, Voetius, Gravina, and Pothier, are as dear to the scholar, as they are to the lawyer. An Englishman, however, must reflect with pleasure, that his countryman, Mr. Justice Blackstone's Commentaries on the Laws of England, will not suffer in a comparison with any foreign work of jurisprudence;—perhaps it will be difficult to name one of the same nature, which will bear a comparison with it.*

VII.

IT remains to give some account of THE INFLUENCE OF THE CIVIL LAW ON THE JURISPRUDENCE OF THE MODERN STATES OF EUROPE.

On the degree of its influence on the law of Germany, the German lawyers are not agreed: but it is a mere dispute of words; all of them

* This article is chiefly taken from the cited works of *Gravina and Brunquellus.*

allow

allow that more causes are decided in their courts, by the rules of the civil law, than by the laws of Germany; and that, where the laws of Germany do not interfere, the subject in dispute must be tried by the civil law; after these concessions, it is not material to inquire, whether, to use the language of the German lawyers, the civil law be the dominant law of Germany, or subsidiary to it.

The same may be said of its influence in Bohemia, Hungary, Poland and Scotland.

At Rome, and in all the territories of the pope, it is received without limitation; in most other parts of Italy, including Naples and the two Sicilies, it has nearly the same influence; except where the feudal policy intervenes.

Its influence in Spain and Portugal is more qualified; but it appears to be admitted, that where the law of the country does not provide the contrary, the civil law shall decide: and it is the settled practice, that no person shall be appointed a judge or received an advocate in any of the courts of law, who has not been a student in some academy of civil or canon law for ten years.

The provinces of France, which lie nearest to Italy, were the first conquered by the Romans, and the last conquered by the Franks. At the time of the conquest of them by the Franks, they were wholly governed by the Roman law: they

they are the provinces of Guyenne, Provence, Dauphiné, and speaking generally, all the provinces, under the jurisdiction of Toulouse, Bourdeaux, Grenoble, Aix, and Pau; the Lyonnois, Forez, Beaujolois, and a great part of Auvergne. Their Frankish conquerors permitted them to retain the Roman law; where it has not been altered, they are still governed by it: and, from this circumstance, they are known under the general name of the Pays du Droit ecrit. The remaining part of France is governed by the different laws and customs of the provinces of which it is composed, and from this circumstance, is called, Pays coutumier.*

The Venetians have always disclaimed the authority of the civil law.

It was introduced into England by Theobald, a Norman Abbot, who was elected to the see of Canterbury. He placed Roger, surnamed Vacarius, in the university of Oxford: students flocked to him in such abundance, as to excite the jealousy of government, and the study of the civil law was prohibited by King Stephen. It continued, however, to be encouraged by the clergy, and became so favourite a pursuit, that almost all, who aspired to the high offices of church or state, thought it necessary to go through a regular course of civil law, to qualify them-

* See Appendix, Note IV.

selves

selves for them: it became a matter of reproach to the clergy, that they quitted the canon for the civil law; and pope Innocent prohibited the very reading of it by them. Notwithstanding this opposition, the study of the civil law has been encouraged in this country: [c] in each of our universities there is a professor of civil law, and, by general custom and immemorial usage, some of the institutions of the civil law have been received into our national law. In the spiritual courts, in the courts of both the universities, the military courts, and courts of admiralty, the rules of civil law, and its form of legal proceeding greatly prevail. But the courts of common law have a superintendency over these courts, and from all of them, an appeal lies to the King in the last resort. "From these strong marks and ensigns of "superintendency it appears beyond doubt," says Mr. Justice Blackstone, "that the civil and canon "laws, though admitted in some cases by custom, "and in some courts, are only subordinate and *le-*"*ges sub graviori lege.*" The short but very learned treatise of Arthur Duck, de Usu et Auctoritate juris civilis in Dominiis principum christianorum, conveys, in elegant language and a pleasing manner, complete information on the nature and extent of the influence of the civil law, on the jurisprudence of the modern states of Europe.

[c] It is to be regretted that the study of the civil law is not at all encouraged in the United States, where there are but

but few lawyers who have made it in any degree the object of study. Perhaps it is to be attributed to the want of good elementary books, there being but few extant in the English language, and those mostly out of print. Edward Livingston, Esq. of New Orleans, has undertaken, we hear, to publish a translation of the whole body of the civil law; but though we do not in the least doubt that gentleman's abilities, we conceive that so immense and laborious a work is too much for any one man, however learned and industrious, who is not entirely free from professional avocations; and we should have been more pleased to hear that he had devoted his leisure to some less extensive work on the same subject. Such would be, for instance, an edition of the English translation of Domat on the Civil Law. It is undoubtedly the most excellent elementary book extant on the Roman system of jurisprudence; but a great part of it relates merely to the local laws of France, and would be useless in this country. If that part were extracted from the work, and the remainder published in two handsome octavo volumes, it would probably meet with a ready sale in the United States, and greatly promote the study and knowledge of the Roman law.

The body of the civil law has been entirely translated into the French language; but by different authors. The Institutes by *Ferriere*, the Digests by *Hulot*, the Code and Novells by ———. The collection is to be had of *Tissot*, *Rue Honoré Chevalier*, *Fauxbourg St. Germain*, and of *Le Normand*, booksellers at Paris. There is a translation into English of the *Institutes* only, by *Harris*. A curious anecdote concerning *Hulot's* translation of the Digests, is related by Mons. Camus, *Bibliotheque de Droit*, page 30. Hulot issued propo-

sals in 1764, to publish a complete translation of the *Corpus Juris*, but the lawyers of that day raised a variety of objections against it: they said that it was impossible to render accurately into French the text of the Roman law; and besides that, that text, by becoming too common, and being put within the reach of every practitioner, would greatly multiply law suits. Hulot saw the storm which was gathering against him, and prudently withdrew his proposals. It was not until the period of the French revolution, that his translation of the Digests was published.

It does not appear that any part of the *Corpus*, except the Institutes, has been hitherto translated into any other living language.

THE FEUDAL LAW.

AN attempt will be made in the following sheets to give some account, I. Of the original territories of the nations by whom THE FEUDAL LAW was established; II. Of their first progress and chief settlements in the Roman territories; and III. Of the principal written documents of the Feudal Jurisprudence of foreign countries. It is principally taken from a note of the Editor, in that part of the 14th edition of Coke upon Littleton, which was executed by him.—That note contains also some observations on the peculiar marks and qualities of the feudal law; some account of the principal events in the early history of the feuds of foreign countries; and of the revolutions of the feud in England. But, as the researches which gave rise to that note were chiefly made with a view to the law of real property, the observations in it are principally directed, through every branch of the inquiry, to the influence of the feud on *that* species of property, particularly where the writer treats of the feudal jurisprudence of England. Under that head some general observations are offered, on the

the time when feuds may be supposed to have been first established in England; on the fruits and incidents of the feudal tenure; and on the feudal polity of this country, with respect to the inheritance and alienation of land: under this head an attempt is made to state the principal points of difference between the Roman and feudal jurisprudence in the articles of heirship, the order of succession, and the nature of feudal estate: an attempt is then made to shew the means by which some of the general restraints upon the alienation of real property, introduced by the feud, have been removed; some account is then given of entails, and of the means by which the restraints created by entails were eluded or removed. Having thus treated of that species of alienation, which, being the act of the party himself, is termed voluntary alienation, notice is taken of that species of alienation, which, being forced on the party, is termed involuntary. Under that head are briefly considered the attachment of lands for debt; first, in regard to its effect upon them, while they continue in the possession of the party himself; then, in respect to its effect upon them, when in possession of the heir or devisee; and afterwards, in respect to the prerogative remedies for the recovery of Crown debts. Some observations are then offered on testamentary alienation; and an account of some

of

of the principal circumstances in the history of the decline and fall of the feud in England.

I.

In respect to the *ORIGINAL TERRITORIES* of the nations who introduced the feudal law;—they may be considered under the names of Scythians, Sarmatians, Scandinavians, Germans, Huns and Sclavonians, which they acquired as they extended their conquests. Till lately, the inhabitants of the shores of the Baltic were considered to be their parent stock: subsequent researches seem to have traced it to the spot where the common stock of all nations is found,—the Plain of Sennaar.

I. 1. For the early state of the Northern nations we must look to Herodotus. Of the north-western parts of Europe, he seems to have had little knowledge: the word Germany does not occur in his writings; *Scythia* is a general name given by him to the north-eastern parts of Europe, and to all he knew of the north-western parts of Asia, till he reached the Issedones, a nation who, by Major Rennel's account, occupied the present seat of the Oigur or Eluth Tartars.

The European part of this extensive territory lies on the western, its Asiatic part on the eastern, side of the Volga. On the south, the European Scythia extended to the Carpathian mountains and the mouths of the Danube; and the Asiatic

Scythia

Scythia to the Caspian and the country on its east. As it was intersected by the great chain of mountains called the Imaus or Caff, the Asiatic Scythia was distinguished into the Scythia within, and the Scythia without the Imaus.

I. 2. Under the general denomination of *Celts*, Herodotus included all the parts of Europe which were not occupied by the Scythians.

I. 3. In the course of time, the name of Scythia was applied to the eastern part only of the original Scythia; but the division of it into the part within, and the part without the Imaus was preserved; the western Scythia, or the part of the original Scythia, which lies on the western side of the Volga, then received the name of *Sarmatia*, and was divided into the European and Asiatic Sarmatia; the former contained the country between the Vistula and the Tanais or Don, the latter extended from the Tanais to the Volga.

I. 4. Of the countries on the north of the Baltic, Herodotus seems to have known nothing; to the Romans they were known by the name of *Scandinavia*.

I. 5. The tribes who occupied the country between the Baltic and the Danube, the Rhine, and the Vistula, were equally unknown to Herodotus; to the Romans they were known by the name of Germans.

I. 6. At a very early period, a division of Scythians had advanced to the eastern shore of the central

central part of Asia, and established themselves in the present country of the Mongous: by the Chinese writers, they are called Hiongnous, by the Romans, to whom they were long unknown, they are called *Huns*.

I. 7. At a later period, several tribes of these nations spread themselves over different territories, in the European and Asiatic parts of Modern Russia, and over Bohemia, Poland and Dalmatia; by the historians of the fall of the Roman empire, they are called *Sclavi or Sclavones.**

II.

THE GRADUAL EXTENSION AND DATES OF THE PRINCIPAL CONQUESTS MADE BY THESE NATIONS next come under consideration.

In the reign of Augustus they were powerful enemies to the Romans; they had not, however,

* *Major Rennel's Geographical System of Herodotus, Lond. 4to,* 1800; *D'Anville, Etats formés en Europe après la chute de l'empire Romain, 4to, Paris,* 1771; *and his Geographie ancienne abrigée, Paris, 3 vol. 8vo,* 1768. *Cellarius, Geographia Antiqua, Leipsiæ, 2 vol. 4to,* 1758; *Modern Universal History, vol. 4. p.* 313—379. *and Mr. Pinkerton's Dissertation on the Origin and Progress of the Scythians or Goths, 8vo,* 1787. Some of his facts, arguments or conclusions, may be denied, but neither his learning nor his ingenuity can be disputed.

made

made any impression on their territory, when Tacitus wrote; but he pronounced them, "more formidable enemies than the Samnites, Carthaginians, or Parthians." He seems to intimate an apprehension, that the preservation of the Roman empire depended on the quarrels of the Barbarians among themselves. "The Bructeri," these are his remarkable expressions, "were totally extirpated "by the neighbouring tribes, provoked by their "insolence, allured by their hopes of spoil, and "perhaps inspired by the tutelar deities of the empire. Above sixty thousand Barbarians were destroyed: not by the Roman arms; but in our sight, "and for our entertainment. May the nations, enemies of Rome, ever preserve this enmity to each "other! We have now attained the utmost verge "of prosperity, and have nothing left to demand "of fortune, except the discord of the Barbarians." In the reign of Marcus Antoninus, all the nations of Germany and Sarmatia, entered into a league against the Romans; he dissipated it.—In less than a century the Germans invaded the empire in every part of its territory, on the Rhine and the Danube.

Of all the tribes, who invaded the empire, the Goths are the most remarkable. The universal tradition of the nations of the north, and the universal language of their ancient writers, place the Goths, as early as general history reaches, among the

the nations on the Baltic, and assigns the denomination of Visigoths or western Goths, to those tribes of them, which inhabited that part of Scandinavia which borders on Denmark, and the denomination of Ostrogoths or eastern Goths, to those, which inhabited the more eastern parts of the Baltic. In all their emigrations and settlements, they preserved their names, and the same relative situation. Towards the end of the first century of the Christian æra, a large establishment of them is found on the Vistula, and numerous tribes of the same origin, but known by the appellation of Vandals, are found on the Oder.—History then shews their emigrations to the Euxine, the settlements of the Ostrogoths in the southern parts of Asia Minor, and the settlements of the Visigoths in Thrace. At the battle of Adrianople the Goths obtained over the emperor Valens, a victory from which the empire of the west never recovered.

The irruptions of the northern nations, which ended in their permanent settlements in the territories of the Roman empire, may be traced to the final division of the empire, between Arcadius and Honorius, the sons of Theodosius the great in 395. The empire of the east, comprising Thrace, Macedonia, Greece, Dacia, Asia Minor, Syria, and Ægypt, was assigned to the former; the empire of the west, comprising Italy, Africa, Gaul, Spain,

Noricum, Pannonia, Dalmatia, and Mœsia, was assigned to the latter. - - - - 395 (After Christ.)

In the year 406, the Vandals, Suevi, and Alani, who inhabited the countries bordering on the Baltic, made an irruption into Gaul; from Gaul they advanced into Spain, about the year 415; they were driven from Spain by the Visigoths, and invaded Africa, where they formed a kingdom. - 406 415

About the year 431, the Franks, Alemanni and Burgundians penetrated into Gaul. Of these nations, the Franks became the most powerful, and having either subdued or expelled the others, made themselves masters of the whole of those extensive provinces, which from them, received the name of France. - - - - - - 431

Pannonia and Illyricum, were conquered by the Huns; Rhœtia, Noricum, and Vindelicia, by the Ostrogoths; and these were some time afterwards conquered by the Franks.

In 449, the Saxons invaded Great Britain. The Herulians marched into Italy, under the command of their King Odoacer; and in 476 overturned the empire of the west. - - - - 449 476

From Italy, in 493, they were expelled by the Ostrogoths. - - - - 493

About the year 568, the Lombards, issuing from the Marck of Bradenburgh invaded the Higher Italy, and founded an empire, called the kingdom of the Lombards. After this, little remained

remained in Europe of the Roman empire, besides the Middle and inferior Italy. These, from the time of the emperor Justinian's conquest of Italy by the arms of Belisarius and Narses, belonged to the emperor of the east, who governed them by an Exarch, whose residence was fixed at Ravenna, and by some subordinate officers, called Dukes. 568 After Christ.

In 752, the Exarchate of Ravenna, and all the remaining possessions of the emperor in Italy, were conquered by the Lombards. This, as it was the final extinction of the Roman empire in Europe, was the completion, in that quarter of the globe, of those conquests which established the law of the feud. - - - - - - 752

The nations by whom these conquests were made, came, it is evident, from different countries, at different periods, spoke different languages, and were under the command of separate leaders; yet appear to have established, in almost every state, where their polity prevailed, nearly the same system of law. This system is known by the appellation of the Feudal Law.—Modern researches have shown that something very like feudalism has immemorially prevailed in India.

III.

THE principal written documents, which are the sources from which the learning of foreign feuds

feuds is derived, may be divided into Codes of Laws, Capitularies, and Collections of Customs.

With respect to FEUDAL LEARNING in general, it was long after the first revival of letters in Europe, that the learned engaged in the study of the laws or antiquities of modern nations. When their curiosity was first directed to them, the barbarous style in which they are written, and the rough and inartificial state of manners they represent, were so shocking to their classical prejudices, that they appear to have turned from them with disgust and contempt. In time, however, they became sensible of their importance. They were led to the study of them, by those treatises on the feudal laws, which are generally printed at the end of the Justinianean Collection. These are of Lombard extraction, and naturally gave rise to the opinion, that fiefs appeared first in Italy, and were introduced by the Lombards. From Italy, the study of jurisprudence was imported into Germany; and this opinion accompanied it thither. At first, it appears to have universally prevailed: but, when a more extensive knowledge of the antiquities of the German empire was obtained, there appeared reason to call it in question. Many thought the claims of other nations, to the honour of having introduced the feudal polity, were better founded: some ascribed them to the Franks; others, denying the

the exclusive claim of any particular nation, ascribed them to the German tribes in general, and asserted, that the outline of the law of feuds is clearly discoverable in the habits, manners, and laws of those nations, while still inhabitants of the Hercynian wood. The time, when feuds first made their appearance, has equally been a subject of controversy. The word itself is not to be found in any public document of authenticity before the eleventh century.

III. 1.

The most ancient, and one of the most important, CODES OF LAW, in use among the feudal nations, is the *Salic Law*. It is thought to derive its appellation from the Salians, who inhabited the country from the Leser to the Carbornarian wood, on the confines of Brabant and Hainault. It was probably written in the Latin language, about the beginning of the fifth century, by Wisogastus, Bodogastus, Salogastus and Windogastus, the chiefs of the nation. It received considerable additions from Clovis, Childebert, Clotaire, Charlemagne, and Lewis the Debonnaire. There are two editions of it: they differ so considerably, that they have been sometimes treated as distinct codes.

2. The

2. The Franks, who occupied the country upon the Rhine, the Meuse, and the Scheldt, were known by the name of the Ripuarians, and were governed by a collection of laws, which from them was called the *Ripuarian Law*. They seem to have been first promulgated by Theodoric, and to have been augmented by Dagobert. The punishments inflicted by the Ripuarian are more severe than the punishments inflicted by the Salic law; and the Ripuarian law mentions the trial by judgment of God, and by duel.

Theodoric also appears to have first promulgated *the law of the Alemanni.*

3. *The law of the Burgundians* is supposed to have been promulgated about the beginning of the fifth century; that nation occupied the country which extends itself from Alsace to the Mediterranean, between the Rhone and the Alps. This was the most flourishing of the Gallic provinces invaded by the Germans; they established themselves in it, with the consent of the emperor Honorius. An alliance subsisted for a considerable time, between them and the Romans; and some parts of their law appear to be taken from the Roman law.

4. One of the most ancient of the German codes is that by which the *Angliones and the Werini* were governed. The territories of these nations were contiguous to those of the Saxons; and

and the Angliones are generally supposed to be the nation known in our history by the name of Angles.

A considerable portion of the *Law of the Saxons* has reached us.

The Goths also had their laws, which were promulgated by the Ostrogoths in Italy; by the Visigoths in Spain.

The Goths were dispossessed of their conquests in Italy by the Lombards. No ancient code of law is more famous than *the Law of the Lombards;* none discovers more evident traces of the feudal polity. It survived the destruction of that empire by Charlemagne, and is said to be in force even now, in some cities of Italy.

These were the principal laws, which the foreign nations, from whom the modern governments of Europe date their origin, first established in the countries, in which they formed their respective settlements. Some degree of analogy may be discovered between them and the general customs, which, from the accounts of Cæsar and Tacitus, we learn to have prevailed among them, in their supposed aboriginal state. A considerable part also of them is evidently borrowed from the Roman law, by which, in this instance, we must understand the Theodosian code. This was the more natural; as, notwithstanding the publication of the Ripuarian and Salic codes, the Roman subjects in Gaul were indulged in the free use of the Theodosian

dosian laws, especially in the cases of marriage, inheritance, and other important transactions of private life. In their establishments of magistrates and civil tribunals, an imitation of the Roman polity is dicoverable among the Franks; and, for a considerable time after their first conquests, frequent instances are to be found, in their history, of a difference, and, in some instances, even of an acknowledgment of territorial submission to the emperors of Rome.

III. 2.

In the course of time, all these laws were, in some measure at least, superseded by the CAPITULARIES. The word Capitulary is generic; and denotes every kind of literary composition, divided into chapters. Laws of this description were promulgated by Childebert, Clotaire, Carloman, and Pepin: but no sovereign seems to have promulgated so many of them as Charlemagne. That monarch appears to have wished to effect, in a certain degree, an uniformity of law throughout his extensive dominions. With this view, it is supposed, he added many laws, divided into small chapters or heads, to the existing codes, sometimes to explain, sometimes to amend, and sometimes to reconcile or remove the difference between them. They were generally promulgated, in public assemblies, composed of the sovereign and

and the chief men of the nation, as well ecclesiastics as secular. They regulated, equally, the spiritual and temporal administration of the kingdom. The execution of them was intrusted to the bishops, the counts, and the missi regii. Many copies of them were made, one of which was generally preserved in the royal archives. The authority of the Capitularies was very extensive; it prevailed in every kingdom, under the dominion of the Franks, and was submitted to in many parts of Italy and Germany.

The earliest collection of the Capitularies is that of Angesise, abbot of Fontenelles. It was adopted by Lewis the Debonnaire and Charles the Bald, and was publicly approved of, in many councils of France and Germany. But, as Angesise had omitted many Capitularies in his collection, Benedict, the Levite or Deacon of the church of Mentz, added three books to them. Each of the collections was considered to be authentic, and of course appealed to as law. Subsequent additions have been made to them. The best edition of them is that of Baluze in 1697; a splendid republication of this edition was begun by M. de Chiniac in 1780; he intended to comprise it in four volumes. Two only have yet made their appearance.

In the collection of ancient laws, the capitularies are generally followed by the *Formularia*, or forms of forensic proceedings and legal instruments.

ments. Of these, the formulare of Marculphus is the most curious. The formularia generally close the collections of ancient laws. With the Merovingian race, the Salic, Burgundian and Visigothic laws expired. The capitularies remained in force in Italy longer than in Germany; and in France, longer than in Italy. The incursions of the Normans, the intestine confusion and weakness of government under the successors of Charlemagne, and, above all, the publication of the Decretum of Gratian, which totally superseded them in all religious concerns, put an end to their authority in France.

III. 3.

They were in some measure succeeded by the CUSTOMARY LAW.

1. It is not to be supposed, that the codes of law, of which we have been speaking, entirely abrogated the usages or customs of the countries in which they were promulgated. Those laws only were abrogated by them which were abrogated by the regulations they established. In other respects, the codes not only permitted, but, in some instances, expressly directed, that the *Ancient Customs* should remain in force. Thus, in all the countries governed by the ancient codes, there existed at the same time, a written body of law, sanctioned by public authority, and usages or customs,

customs, admitted to be of public authority, by which those cases were frequently governed, for which the written body of law contained no provision. After the ancient codes and capitularies fell into desuetude, these customs were multiplied.

2. By degrees *Written Collections* of them were made by public authority; others, by individuals, and, depended, therefore, for their weight on the private authority of the individuals, by whom they were made, and the authority which they insensibly obtained in the courts of justice.

Collections of this nature committed to writing by public authority form a considerable part of the law of France, and are a striking feature of the jurisprudence of that kingdom. The origin of them may be traced to the beginning of the Capetian race. The monarchs of that time, in the charters by which they granted fiefs, prescribed the terms upon which they were to be held. These, they often abridged, enlarged, and explained, by subsequent charters: they also published charters of a more extensive nature. Some of them contained regulations for their own domain; others contained general regulations for the kingdom at large. In imitation of their monarch, the great vassals of the crown granted their charters for the regulation of the possessions held of them. In the same manner, when allodial land was changed to feudal, charters were granted for the regulation of the fiefs; and, when villeins were enfranchised,

enfranchised, possessions were generally given them, and charters were granted to regulate these possessions. Thus, each seignory had its particular usages. Such was their diversity, that throughout the whole kingdom, there could hardly be found two seignories, which were governed, in every point, by the same law.

3. With a view more to ascertain than to produce an uniformity in these usages, though the latter of these objects was not quite neglected, Charles the Seventh and his successors caused to be reduced to writing the different local customs. In 1453, sometime after Charles the Seventh had expelled the English from France, he published an ordinance, by which he directed that all the customs and ordinances should be committed to writing, and verified by the practitioners of each place, then examined and sanctioned by the great council and parliament; and that the customs, thus sanctioned, and those only, should have the force of laws. Such were the obstacles in the way of this measure, that forty-two years elapsed before the customs of any one place were verified. From that time the measure lingered, but it was resumed in the reign of Lewis the XII; and about the year 1609, it was completed. The customs of Paris, Orleans, Normandy, and some other places, were afterwards reformed. Those of Artois and St. Omer were reformed within the last hundred years.

The

The manner of proceeding, both in reducing the customs and reforming them, was, generally speaking, as follows. The king, by his letters patent, ordered an assembly of the three states of each province. When this assembly met, it directed the royal judges, greffiers, maires and syndics, to prepare memoirs of all the customs, usages, and forms of practice, they had seen in use, from of old. On receiving these memoirs, the states chose a certain number of notables, and referred the memoirs to them, with directions to put them in order, and to frame a cahier or short minute of their contents. This was read at the assembly of the states; and it was there considered, whether the customs were such as they were stated to be in the cahier: at each article, any deputy of the state was at liberty to mention such observations as occurred to him: the articles were then adopted, rejected, or modified, at the pleasure of the assembly, and, if they were sanctioned, were taken to parliament and registered. The customs of each place, thus reduced to writing and sanctioned, were called the *Coutumier* of that place: they were formed into one collection, called the Coutumier de France, or the Grand Coutumier. The best edition of it is Richebourgh's, in four volumes, in folio. It contains about one hundred collections of the customs of provinces, and two hundred collections of the customs of cities, towns, or villages. Each coutumier

tumier has been the subject of a commentary: five and twenty commentaries, (some of them voluminous), have appeared on the coutumier of Paris. Of these commentaries, that of Dumoulin has the greatest celebrity. *Les Etablisements de St. Louis*, hold a high rank for the wisdom with which they are written, and the curious matter they contain. The *Coutumier de Normandie*, for its high antiquity, and the relation it bears to the feudal jurisprudence of England, is particularly interesting to an English reader: Basnage's edition, and his learned commentary upon it, are well known.

4. These are the principal sources of the Feudal Jurisprudence of France; it remains to take some notice of the *chief compilations, by which the feudal policy of other kingdoms* is regulated. The most curious of all collections of feudal law is that entitled *Assizes de Jerusalem.* In 1099, the object of the first crusade was effected by the conquest of Jerusalem. Godfrey of Bouillon, who was elected king of Jerusalem, but refused the title, called an assembly of the states of his new kingdom. The patriarch, the chief lords, their vassals, and their arriere-vassals attended. With general consent, the collection in question was formed, under the title of "*Les Loix, Statuts, &* "*Coutumes, accordées au Royaume de Jerusalem,* "*par Godefroi de Bouillon, l'an* 1099*; par l'avis* "*du Patriarche et des Barons.*" As this collection was

was made at a general assembly of feudal lords, it may naturally be supposed to contain some of the wisest and most striking rules, by which the feudal polity of Europe was then regulated. But, as the principal personages who engaged in that crusade came from France, it may be considered as particularly descriptive of the laws and usages of that country.

5. The next to these, in importance, are *the Books of Fiefs*, which, probably in the reign of Frederick the Second, Hugolinus, a Bononian lawyer, compiled from the writings of Obertus, of Orto, and Gerhardus Niger, and the various customary laws then prevailing in Italy; they are sometimes added, under the title Decima Collatio, to the Novells; and are to be found in most of the editions of the Corpus Juris Civilis. In the edition of Cujas they consist of five books; the first, contains the treatises of Gerhardus Niger; the second and third, those of Obertus of Orto; the fourth, is a selection from various authors; the fifth, is a collection of constitutions of different emperors respecting feuds.[*d*] To these, the Golden Bull of the emperor Charles the Fourth is often added. Authors are by no means agreed, either as to the order, or the division of this collection. Several editions have been made of it.

6. In that published by Joannes Calvinus or Calvus, at Frankfort, in 1611, there is a collection of *every passage in the canon law, that seems to relate*

[*d*] This collection is of immense interest to those who wish to become well acquainted with the system of the feudal law,

relate to the law of feuds. As this edition is scarce, and it may happen, that some English reader may be desirous of seeing all these passages, the following short account of Calvinus or Calvus's selection of them, is transcribed from Hoffman's Dissertatio de Unico Juris Feudalis Longobardici Libro.—" Jurisprudentiam feudalem, sex libris " comprehensam, sive potius consuetudines feu- " dorum, secundum distributionem Cujacianam, " edidit, et sub titulo libri feudorum VI. addidit, " quidquid

law, and may serve to clear up many obscure points in English jurisprudence; we clearly trace there the nature and origin of the ancient trial by jury, and we find the hypothesis of lord Kaims fully established, to wit: that trial by jury was originally nothing more than a trial by *twelve witnesses* who *deposed* of facts within *their own knowledge*, and not judges of fact deciding as they now do on *extraneous proofs*. We invite our readers to turn to that passage of the celebrated Scotch jurist, Law Tracts, page 85. and then take, together with his strong, and, in our opinion, conclusive arguments, the following text out of the first book, Tit. 10. of the *Consuetudines feudorum*, or book of feuds: *Si contentio fuerit inter dominum et fidelem de investiturâ feudi, per pares curiæ dirimatur:* ALII ENIM TESTES, *etsi idonei, admittendi non sunt.* " If there should " be a controversy between the lord and his vassal, let it be " tried by the *pares curiæ*, and let NO OTHER WITNESSES, " though competent, be admitted." To which we may add the following passages out of *Glanville*, who wrote in England in the twelfth century, about the same time that *Obertus de Orto*

" quidquid alicujus de hac materia momenti, in " universo corpore juris canonici expressum in- " venerat; hoc est totum titulum decretalium " Gregorii IX. sive capitula, Insinuatione 1. Et ex " parte tua 2. X. de feudis porro cap. cæterum, " 5. et novit; 13 de Judiciis, cap. Quæ in Eccle- " siarum, 7 de Constitutionibus, cap. Ad dures, " 10 in quibusdam, 12 et Gravem, 53 de Sent. ex- " comm. cap. Ex transmissa, 6 et verum, 7 de " foro competente eorumque summaria."

7. The

Orto wrote in Lombardy, about three hundred years *before* Littleton. In his second book, after describing the manner of proceeding in the trial by the grand assize, RECOGNITIONE *duodecim militum*, he says, § 21. *Si verò reperiantur nulli milites de vicineto nec in comitatu ipso, qui* REI VERITATEM *indè* SCIANT, *quid juris erit?* &c. " If there cannot be found any " knights in the vicinage, nor in the county itself, *who* KNOW " *the truth of the fact*, what then is to be done? Is the de- " mandant in that case to be nonsuited?" Glanville thus states the question, but does not solve it; he seems to think that under certain circumstances, the *Duel* perhaps may in that case be awarded. He appears, however, to consider the *milites*, who in a trial by the grand assize, were called to *recognize* the right of the parties, merely in the light of the demandant's witnesses, as the *compurgators* in a law-wager, were witnesses in behalf of the tenant. And again, book 2. § 12. he tells us that jurymen at common law are liable to the same exceptions that witnesses are in the ecclesiastical courts: *Excipi autem possunt juratores ipsi eisdem modis quibus et*

 testes

7. The next treatise to be mentioned is, the Treatise *de Beneficiis*, generally cited under the appellation of *Auctor vetus de Beneficiis*. It was first published by Thomasius at Halle, 1708, with a dissertation on its author, and the time when it was written. He considers it to be certain that it was written after the year 800, and before the year 1250, and conjectures that it was not written before the emperor Otho, and that it was written before the emperor Conrad the Second. To these must

testes in curiâ christianitatis justè repelluntur. As we are not writing a dissertation, we shall not carry our quotations farther, nor indulge in any of the reflections which naturally flow from the subject; we are satisfied with having followed the great lord Kaims in pointing out the way to one of the most curious and interesting disquisitions which the study of the English law affords. It is highly worthy the attention of the *American jurist*, particularly at this moment, when the venerable institution of trial by jury is attacked on all sides, and the noble edifice is threatened with demolition by *Vandal* reformers. By tracing it to its original construction, its ancient form and proportions may be clearly viewed; the perspicacious mind may discern what parts of it have suffered from the lapse of time; what are less suited to the present state of society than to that of the times for which it was first established; what repairs, if any, are needed, to be performed by skilful, though always trembling hands, so that it may stand firm on its sacred foundations to the remotest posterity.

must be added, the *Jus Feudale Saxonicum*, which seems to be a part of, or an appendix to, a treatise of great celebrity in Germany, intitled the *Speculum Saxonicum*. The *Jus Feudale Saxonicum*, is said by Struvius to have been translated by Goldastus from the German into the Latin language, for the benefit of the Poles. It is supposed to have been published between the year 1215 and the year 1250. The *Speculum Suevicum* seems to have been composed, in imitation of the Speculum Saxonicum, probably between the year 1250 and the year 1400. To this is added the *Jus Feudale Alemannicum*, composed about the same time, and probably by the same author. But none of these collections acquired the same authority as the Books of the Fiefs. Those were known by the name of the Lombard Law: by degrees they were admitted as authority by most of the courts, and taught in most of the academies of Italy and Germany.

8. Like the civil and canon law, they became the subject of innumerable *Glosses*. Those of Columbinus were so much esteemed, that no one, it is said, published any after him. About the end of the thirteenth century, James of Ardezene published a new edition of the gloss of Columbinus, and added, under the title of Capitula Extraordinaria, a collection of adjudged cases on feudal matters. This is inserted in some of the latter editions of the Corpus Juris. About the year 1430, Mincuccius

cuccius de Prato veteri, a Bononian lawyer, by the orders of the emperor Sigismond gave a new edition of the books of the fiefs, with a gloss of Columbinus. These were confirmed by the emperor Sigismond, and afterwards by the emperor Frederick the Third, and publicly taught in the university of Bologna.*

* This article is extracted from the *Historia Juris Romano-Germanici of Brunquellus; the Historia Juris Civilis Romani et Germanici of Heineccius, already cited;* from *Lindenbrogius's Prolegomena to his Codex Legum Antiquarum, Frankfort*, 1 *vol. fol.* 1613; *Baluzius's Preface to his Capitularia Regum Francorum*, 1677 *and* 1780; *the Thesaurus Feudalis of Jenichen, published at Frankfort on the Main*, 3 *vols. 4to*, 1750; *Struvius's Historia Juris, Jenæ*, 4*to*, 1728; *Selecta Feudalia of Thomasius, Halle*, 8*vo*, 1728; *Fleury's Histoire du Droit Français, Paris*, 2 *vol.* 8*vo; generally prefixed to the Institution au Droit Français d'Argou; and the article, Coutume, sent by M. Henrion to the French Encyclopedia.*

THE CANON LAW.

THE following sheets, after some introductory matter respecting, I. the religious worship and hierarchy of Pagan Rome; II. respecting the rise and progress of Christianity, from its being the most persecuted sect, to its becoming the established church of the Roman empire; and III. respecting the principal orders of the Christian hierarchy; will contain, IV. a mention of the general materials, and V. an historical account of the particular documents, of which the CANON LAW is composed.

I.

I. 1. It seems generally understood that the ANCIENT RELIGION OF ROME was of Celtic extraction, without images, without temples, and with few religious rites; that Numa established many ceremonies, and built a temple for sacrifices to the one eternal God; that, in other respects, he left the religion of Rome in its original

ginal simplicity; and that Tarquinius Priscus introduced into it the superstitions of the Greeks and Hetruscans.

I. 2. THE GODS, whom the Romans worshipped, were divided into the *Dii Majorum Gentium*, or the great cœlestial deities, with the *Dii Selecti;* and the *Dii Minorum Gentium*, or the inferior gods. The cœlestial deities were twelve in number: Jupiter, the king of gods and men; Juno, his sister and wife; Minerva, the goddess of wisdom; Vesta, the goddess of fire; Ceres, the goddess of corn and husbandry; Neptune, the god of the sea; Venus, the goddess of love and beauty; Vulcan, the god of fire; Mars, the god of war; Mercury, the god of eloquence and trade; Apollo, the god of music, poetry, medicine and augury; and Diana, the goddess of the woods. The *Dii Selecti* were Saturn, the god of time; Janus, the god of the year, and Rhea his wife; Pluto, the king of the infernal regions; Bacchus, the god of wine; Sol, the sun; Luna, the moon; and Genius, each man and each place's tutelary god. The *Dii Minorum Gentium* were the Dii Indigetes, or heroes ranked among the gods on account of their heroic virtues, as Hercules, Castor and Pollux, Æneas and Romulus; the Dii Semones, or Semihomines, less than gods and greater than men, as Pan, Pomona, Flora, Terminus, the Nymphs.

I. 3. To

I. 3. To the service of these gods *several colleges of priests* were dedicated:—Fifteen Pontiffs, whose office it was to judge and determine on all sacred things; fifteen Augurs who, from the flight, chirping or feeding of birds, and fifteen Aruspices who, from entrails of victims, derived omens of futurity; the Quindecemviri, who had the care of the Sibylline books; the Septemviri, who prepared the sacred feasts; the Fratres Ambervales, who offered up sacrifices for the fertility of the grounds; the Curiones, who officiated in the Curiæ; the Feciales, or sacred persons employed in declaring war and making peace; the Sodales Titii, whose office it was to preserve the sacred rites of the Sabines; and the Rex Sacrorum, to whom that title was given from his performing certain sacred rites, which could only be performed by royal hands.

In addition to these, each god had his Flamines, or particular priests. The six vestal virgins had the care of the sacred fire in the temple of Vesta, and the secret pledges of the eternal duration of Rome were intrusted to them. Every part of the empire abounded with temples and statues, and in every temple and statue a divine something was supposed to reside.

When we consider the general absurdity of the pagan creed, we find it difficult to suppose, that any rational mind could seriously believe its doctrines, or that it should become the national religion of

of a great and sensible people. Those doubts increase on us, when we see how often the religious prejudices of the Romans were used by the leading men of Rome as an engine for political purposes; when we consider the ridicule with which the less and even the greater deities were treated by their poets, philosophers, and historians; and when we read the passages in the works of Cicero and other writers, in which, often indirectly, and sometimes in the most direct terms, they deliver it as their opinion, that, in religion there are many truths which it is not expedient the vulgar should know; and many falsehoods which it is useful for the people to receive as truths. But there is reason to believe, that till the Greek philosophy found its way into Rome, the general body of the Romans was sincere in the worship of their gods; and that, even after the introduction of the Greek philosophy, the number of those who gave up the whole of the national creed was very small. A freedom, even from the lowest kind of superstition, is often mentioned by their writers as a great effort of the human mind: and the writings of Cicero demonstratively prove, that those who rejected the popular superstition, had no settled system of religious belief to substitute in its place. The total extirpation of pagan superstition, which pagan philosophy could not effect, it is the triumph of christianity to have accomplished; and to have introduced at the same time, a simple and sublime religion,

religion, accommodated to all persons, all times, and all circumstances, on which the weak and the strong may equally rely.*

II.

BY the law of Athens, the act of introducing foreign deities was punished with death. The law of Rome was not so severe: Mosheim and Bynkershoek seem to prove, that though the Romans would not allow any change to be made in the religions which were publicly professed in the empire, nor any new form of worship to be openly introduced, yet that, except when it threatened danger to the state, they granted a FREE TOLERATION OF FOREIGN WORSHIP not only to individuals but to bodies of men.

The Christians, whose mild, unassuming, and benevolent morality entitled them to universal good will, were alone denied the benefit of this general toleration. From the reign of Nero, till the triumph of Constantine the Great over his rival Licinius, they were always treated with harshness, and repeatedly suffered the severest persecutions.

The favour of Constantine to them was, immediately after his first successes, shown by his

* Beaufort, Rep. Rom. l. 1. Adams's Roman Antiquities, 281—303.

repealing of the laws enacted against them. By the edict of Milan he restored them to all their civil and religious rights, and allowed them, in common with the rest of his subjects, the free choice and exercise of their religion. In the general dispensation of his favours, he held, with an impartial hand, the balance between his christian and heathen subjects. His successors, except during the short interval of Julian's reign, strongly encouraged christianity and discountenanced heathenism; and finally, by the edicts of Theodosius, the ancient worship of Rome was proscribed, and christianity became the established religion of the empire. Till those edicts, the spirit of polytheism, had lingered among the principal nobility of Rome; after them, it lingered among the Grecian philosophers: but by his edict in 529, Justinian silenced the schools of Athens, and to that æra the final extinction of Paganism is always assigned.*

* *Francis Balduinus, Commentarius ad edicta imperatorem in Christianos, Edit. Gundling; Bynkershoek, Dissertatio de Cultu Peregrinæ Religionis apud Romanos, in Opusculis, Lugd. Bat.* 1719. *Mosheim, de Rebus Christianorum ante Constantinum Magnum, Commentarii, Helmstadii, 4to,* 1753, *c.* 1. *sect.* 8.; *Seculum primum,* 27—32. In his *Six Letters on Intolerance, London,* 1791, *Sir Geo. Colebrooke* has collected many curious facts to show, that the religious toleration of the Romans was by no means so perfect as is generally thought.

III. IN

III.

IN respect to the CHRISTIAN HIERARCHY, the Roman empire, at the time when Christianity obtained in it a legal establishment, under Constantine the great, had reached its utmost limits. It was divided into four Præfectures: the Eastern, which comprised the country between Thrace and Persia, the Caucasus and the Cataracts of the Nile; the Præfecture of Illyricum, which comprised Pannonia, Dacia, Macedonia, and Greece; the Præfecture of Italy, which comprised Italy, Rhœtia, the Islands of the Mediterranean, and the part of Africa from the westernmost mouth of the Nile to Tingitana; and the Præfecture of the Gauls, which comprised Spain, Britain, and the part of Africa from Tingitana to the western ocean. Each præfecture was divided into several dioceses; each diocese into several provinces; and in each province there was one, and sometimes more than one mother-town, on which other towns depended. The dioceses were thirteen in number, the provinces one hundred and twenty.

In the establishment of her hierarchy, the Christian church, particularly in the east, appears to have conformed very much to this model. Before the translation of the seat of the Roman empire to Constantinople, the church had the three Partriarchates of Rome, Antioch, and Alexandria; after its

its translation, the bishops of Constantinople acquired importance; by degrees they obtained ecclesiastical jurisdiction over Thrace, Asia, and Pontus, and were elevated to the rank of patriarch: afterwards, the same rank was conferred on the bishop of Jerusalem: and, according to Mr. Gibbon's observation, (vol. 6. p. 378.), the Roman bishop was always respected as the first of the five patriarchs. Thus, speaking generally, the patriarchs corresponded in rank with the prefects; in each diocese there was a primate; in each province, one or more than one metropolitan; and each metropolitan had under him a certain number of suffragan bishops. Regular funds, proportioned to their respective ranks, were appropriated for their support: except in cases of singular enormity they were exempted from the civil jurisdiction of the magistrate; and, in many other important articles, a distinction between the clergy and the laity, wholly unknown in the law of heathen Rome, was admitted into the Codes of the Christian emperors.*

* *Frederici Spanhemii, Geographia Sacra, Distributio Diœceseon et Provinciarum, inde a Temporibus Constantini Magni in orbe utroque, orientali et occidentali; inter Opera Omnia, Lugduni Batavorum, fol.* 1 *vol.* 75—204; *Bingham's Antiquities of the Christian Church, London,* 1726. *fol.* 2 *vol. lib.* 9.; *Du Pin, de Antiquâ Ecclesiæ Disciplinâ, Par.* 1686; *Petrus de la Marca, Concordia Sacerdotii atque Imperii, fol. Paris,* 1704.

IV. THE

IV.

THE liberty of holding ecclesiastical assemblies was one of the most important privileges of the dignified members of the clergy. Occasional assemblies were convened of all the bishops in the christian world, or of all the bishops within the limits of a patriarchate: and, generally in the spring and autumn of every year, the metropolitan convened the bishops of his province to debate on its religious concerns. From Concilium, which, among the Romans, denoted a select meeting in contradistinction to Comitia, which they used to denote general meetings, these assemblies received, in the Latin church, the appellation of councils; in the Greek church they were called synods; at a subsequent time, the word council still retaining its original import, the word synod was used, in the Latin church, to denote the assembly of a bishop and his clergy. The Scripture is the first, the decrees of the councils are the second source, from which THE MATERIALS OF THE CANON LAW are drawn. The decrees and decretals of the popes are the third; the works of the fathers and other respectable writers are the fourth. By the decrees of the popes are meant their decrees in the councils held by them in Italy; the decretals are their answers to questions proposed to them on religious subjects.

V. THOSE,

V.

THOSE, who profess to give an HISTORICAL ACCOUNT OF THE CANON LAW, divide it into three periods: the ancient, the middle, and the modern:—the ancient, begins with the first, and ends with the eighth century, when Isidore Mercator's collection of canons made its appearance; the middle, begins with that century, and ends with the council of Pisa, in 1409; the modern, begins with that council, and extends to the present time.

V. 1.

THE ANCIENT PART OF THE HISTORY OF THE CANON LAW is remarkable for several Collection of Canons. After Christ.

1. Some are *CANONS OF THE GENERAL CHURCH.*

The first collection of these canons is called the *Apostolic Canons*. They have been imputed to the apostles; and it has been said, that St. Clement, the immediate successor of St. Peter, was the collector of them. If the apostles had really promulgated them, it is difficult to assign a reason for their not having been admitted to a place in the writings which form the New Testament; but, of the

the ancient fathers, St. John Damascene alone has done them that honour. From their being omitted in the canon of the New Testament, from the universal silence of the fathers of the three first ages respecting them, from the mention in them of many offices and customs, which there is every reason to suppose of a later origin, from no appeals having been made to them in the controversies which arose in time subsequent to them, and on which their language is decisive, and from no mention having been made of them in the synod held at Rome in 496, which mentions all the writings of the Old and New Testament, they are now considered to have been fabricated. Bishop Beveredge, who has published them with learned notes, supposes they were framed under the sanction of bishops, who held the sees founded by the apostles, and that they were collected towards the end of the second or beginning of the third century. The first regular mention of them is found in the second council of Constantinople. After Christ.

The Greek church, at least since the synod in Trullo, in 692, has singularly respected them, and considered the 85 first of them as authentic: the Latin church seems to have admitted the 50 first of them. They were first printed at Venice in 1563, in 4to, and have often been reprinted. - 200

The Apostolic Constitutions are of high antiquity, have been much interpolated, and are of no authority.

thority. It is supposed that they first appeared in the fourth century. - - - After Christ. 300

2. Hitherto, the canons spoken of are the canons of the general church: there also are *CANONS OF PARTICULAR CHURCHES.*

In respect to the *Greek Church*, the first collection of canons which has come down to us from the Greek church, is the *Codex Ecclesiæ Orientalis*. It is supposed to have been first published in - - 385

This collection contains 165 canons: 20 of them are canons of the general council of Nice; 24, are canons of the council of Ancyra; 14, are of the council of Neocesaræea; 20, of the council of Gangris; 25, of the council of Antioch; 59, of the council of Laodicea; and three of the first council of Constantinople. The council of Chalcedon mentions this collection with approbation.

The second collection of canons of the Greek church is, the *Codex Ecclesiæ Universæ*. - 451

It comprises the canons in the preceding collection, with the addition of some omitted canons of the council of Constantinople, some of the council of Ephesus, and some of the council of Chalcedon.

Both these collections are confined to the canons of the councils of the oriential churches; but they by

by no means include all the canons of all the councils of those churches. After Christ.

About the middle of the sixth century, John, then a priest of Antioch, afterwards patriarch of Constantinople, published a collection of the Greek canons, digested under fifty heads, according to the subjects of them. He afterwards published an abridgment of it: the first is called his *Collection of Canons;* the second his *Nomo-Canon:* he is generally called Joannes Scholasticus. - - 560

We know little more of the canons of the Greek church till the *Synod in Trullo.* By that synod, a code was formed of the canons framed at it, of those framed at the synods of Carthage, and at the council of Constantinople, held by Nectarius, and of some writings of the fathers. To those were added the twenty-two canons of the second council of Nice, and the fourth council of Constantinople. - 692

Here, before the schism, which separated the Greek from the Latin church, the code of the Greek canon law rested. Under Photius, two councils were held at Constantinople: the canons of those councils were received by the schismatic churches of the east, and were published by Photius in his *Nomo-Canon*, or modern collection of canons, in 883

With the *Commentaries of Balsamon, Zonaras, and Aristenus*, and other curious articles, and with a learned preface, all these collections of canons

were published, at Oxford, by Dr. Beveredge, afterwards Bishop of St. Asaph, under the title, "*Pandectæ Canonum Sanctorum Apostolorum et "Conciliorum ab Ecclesiâ Græcâ receptorum.*" "Those," says Van Espen, "who will read with "attention, the notes of the learned editor, will "find much very learned exposition of the canon "law, and much instructive matter on other sub-"jects, connected with the learning of the canons." "Bishop Beveredge's works," says L'Advocat, "are written with so much dignity, majesty, learn-"ing, and modesty, that he is thought, with reason, "to be one of the greatest and most learned men "whom England has produced. An epistolary cor-"respondence was carried on between him and "Bossuet."

3. In the *LATIN CHURCH*, frequent mention is made of the *Vetus Canonum Latinorum Editio*. It was superseded by the collection made by *Dionysius Exiguus*, about the beginning of the sixth century. That collection was afterwards enlarged by the decrees of Pope Symmachus, Pope Hormisdas, and Pope Gregory the Second. This collection was of great authority both in the Greek and the Latin churches.

4. Other Churches had their Collections of Canons. The *CHURCH OF AFRICA* had hers: the *Breviatio Canonum of Fulgentius Ferrandus*, and the *Breviarium and Concordia Canonum of Cresconius* are added to it.

The

The *CHURCH OF SPAIN* also had her collection of canons. It is attributed to St. Isidore the Bishop of Seville; from his diocese, he is frequently distinguished by the appellation of Hispalensis. After Christ.

In 790, Pope Adrian presented Charlemagne with a collection of canons. It was composed of the collection of Dionysius Exiguus, and the epistles of several popes.

At the council held at Canterbury in 873, a book of canons was produced and approved of; but we do not know what canons it contained.

V. 2.

1. The MIDDLE PERIOD OF THE HISTORY OF THE CANON LAW commences with the ninth century, at the beginning of which, or towards the end of the preceding century, *the collection of Isidore Peccator or Mercator* probably made its appearance. - - - 760

It was brought from Spain into Germany by Riculphus, the bishop of Mayence. Who the compiler of it was, and why he assumed the name of Peccator or Mercator, are merely matters of conjecture. It sets out with describing the manner in which a council should be held; then, the fifty first of the canons of the apostles follow: "Deinde," says the author, "quarumdam epistolarum decreta

" decreta virorum apostolicorum inseruimus, id A
" est, Clementis, Anacleti, Evaristi, et cæterorum C
" apostolicorum, quas potuimus hactenus repe-
" rire, epistolas usque ad Syvestrem Papam."

These are the celebrated decretals, concerning which, since the beginning of the sixteenth century, there has been so much dispute among the learned. They seem to have made their first appearance in Germany: afterwards, to have been received in France, and, by degrees, to have been received in every part of the western church. For seven centuries after their first appearance, neither their authenticity nor their authority appears to have been questioned.

They were first attacked by Marcillus of Padua, then, by Cardinal Nicholas of Cusa, during the Council of Basil, and afterwards by Erasmus. In the celebrated Centuriators of Magdeburgh, in Blondel, and, lastly, in Van Espen, they have met with most powerful adversaries: in the author of the celebrated treatise, " Quis est Petrus," they have found both a zealous and an able advocate: but he seems to concede, that so much spuriousness is proved on them as to make them, when they stand alone, of no authority.

They are followed by what are called the *Capitularies of Adrian.* - - - 84

The tenth century was famous for the *Collection of Rheginon, Abbot of Prumia.* - - 90

The

The eleventh, for the collection of Burchardus, bishop of Wormes, entitled *Magnum Decretorum seu Canonum Volumen.* - - - 1000 After Christ.

The twelfth, for the collection of St. Ivo, the good lawyer. Two works are attributed to him: the *Decretum Canonum*, certainly belongs to him; his right to the second, the *Panomia*, is uncertain. 1100

2. We now come to the celebrated *Decretum Gratiani*, or the *Concordia Discordantium Canonum.* Gratian was a Benedictine monk, in a monastery of Bologna. His work is an epitome of Canon Law, drawn from the decrees of councils, the letters of pontiffs, and the writings of ancient doctors. Pope Eugenius the third was extremely satisfied with the work: and it was soon adopted in every part of the western church. - - - 1150

It is divided into three parts: the first contains 101 distinctions or heads, and treats of the origin and different kinds of law, and particularly of the sources of ecclesiastical law, of persons in holy orders, and the hierarchy. The second contains 36 causes, as they are called, or particular cases, on which questions of difficulty arise: the third is divided into five distinctions, and contains a collection of canons relating to the consecration of churches, the sacraments, and the celebration of the divine office. The whole contains about 3000 canons or capitularies. Some are entitled

Paleæ,

Paleœ, the meaning of which word is not yet ascertained by the learned. After Christ.

This celebrated collection abounds with errors. Towards the middle of the sixteenth century, Antonius Democharès and Antonius Contius, the former a divine, the latter a canonist, published a corrected edition of it.

A more correct edition of it we owe to the council of Trent. By a decree of that council, it was ordered that correct editions of missals, breviaries, and other books relating to ecclesiastical matters should be published.

In consequence of this decree, pope Pius the fourth engaged several learned men in the correction of the decree of Gratian. The work was continued through the pontificate of Pius the fifth. Gregory the thirteenth, the immediate successor of Pius the fifth, when a cardinal, had been employed on the work: under his auspices, it was finally published about the year - - 1580

Several faulty passages still remain in the work. Many of them have been pointed out by Antonius Augustinus, the Archbishop of Tarragon, in his learned and entertaining dialogues on the Emendation of Gratian.

Such is the celebrated decree of Gratian, which for 800 years, has, in every country in christendom, been considered a valuable repository of Canon Law.—To the compilations of Isidore and Gratian, one

one of the greatest misfortunes of the church, the claim of the popes to temporal power by divine right, may in some measure be attributed. That a claim so unfounded and so impious, so detrimental to religion, and so hostile to the peace of the world, should have been made, is strange—stranger yet, is the success it met with. After Christ.

It was soon observed, that the author had omitted in his collection several important articles. This gave rise to subsequent collections. The principal of them are the *Breviarium of Bernardus Papiensis*, and the *Collections of Johannes Galensis* and *Peter Beneventanus*. Of these, the last only was formally approved by the see of Rome. Pope Innocent the third published a collection of his own decretal epistles. His example was followed by Honorius the third, his immediate successor.

From these five collections, and from some decretals of his own, pope Gregory the ninth commissioned St. Raymond of Pennafort, a Dominican, to form a new collection of canons. He executed the work greatly to the satisfaction of his holiness; and, under his auspices, it was published about the year 1230, under the title *Libri quinque Decretalium Gregorii Noni.* It contains all the decrees of the council of Lateran, and the decisions of many popes on particular cases. It is divided into five books. 1230

A further addition to the code of Canon Law was made by pope Boniface the Eighth. It contains

tains the decretals of all the popes, subsequent to Gregory the Ninth, and the decretals of that pope. It is called *Liber Sextus Decretalium*, and was published in - - - - - After Christ. 1298

On account of the differences between pope Boniface and Philip the Fair, it was not received in France.

The Liber Sextus Decretalium is followed by the collection, called sometimes *Liber Septimus Decretalium*, and sometimes *Clementis Papæ Constitutiones*. It was framed by pope Clement the Fifth; and consists of his own decretals, particularly the canons of the council of Vienne, at which he presided. He promulgated it in - - 1313

The last article in the code of Canon Law is the *Extravagantes*. At first, every collection of Canon Law, except the decree of Gratian, was ranked among the Extravagantes. In the course of time, that name remained only to the collection of which we are now speaking. It is divided into two articles, the *Extravagantes Joannis XXII.*, or the decretals of that pope, published by him about the year - - - - - 1340

And the *Extravagantes Communes*, consisting of the decrees of popes from Urban the Sixth to Sixtus the Fourth. It was published about the year - 1483

Neither of them is considered to be of authority. The first, (published under the name of pope John the twenty-second,) was never formally

formally approved of or sanctioned by him, and the author of the latter collection is wholly unknown. After Christ.

A collection by Peter Matthæi was published in 1590

In some modern editions of the Corpus Juris Canonici, it is inserted under the title of the *Liber Septimus Decretalium.*

With these, what is called the Corpus Juris Canonici and the middle period of the history of the Canon Law closes.

But mention should also be made of the *Institutiones Juris Canonici*, a compendium of Canon Law, published by Lancellot, a lawyer of Perugium, in 1563. By the direction of pope Pius the fifth, but without any confirmation of it by him, it was subjoined to the Corpus Juris Canonici, and has been published with it. "The Roman pontiffs," says Arthur Duck, (de Auctoritate Juris Civilis, lib. 1. c. 6. tit. 8.) "effected that, in the church, "which Justinian effected in the Roman empire: "they caused Gratian's Decree to be published in "imitation of the Pandects; the Decretals, in "imitation of the Code; the Clementinæ and "Extravagantes, in imitation of the Novells; and "to perfect the work, Paul the Fourth ordered "Lancellot to compose the Institutes; and under "Gregory the Thirteenth, they were published "at Rome, and added to the Corpus Juris Ca-"nonici." In the edition of the Institutions of

Lancellot, published in 1584, and in several subsequent editions, it is accompanied with a perpetual gloss, and followed by a commentary, written by Lancellot, which gives an account of the rise and progress of the work; and by a comparison of the Civil and Canon Law, also written by him.

V. 3.

THE MODERN PERIOD OF THE CANON LAW begins with the Council of Pisa, and extends to the present time.

The principal articles of canonical learning, which have appeared during this period, are,

1. The various *Transactions* [*e*] *and Concordats between sovereigns, and the See of Rome;*—a succinct and impartial history of them is wanting: the papal arrangements with Bonaparte would not be the least curious parts of such a work.

2. The *Councils of Basil, Pisa, Constance, and Trent.*

Separate histories have been written of the councils of Basil, Pisa, and Constance, by M. L'Enfant, a Lutheran minister: that of the council of Constance is the best written; it contains an account of a fact of importance to the English nation, but not generally mentioned by her historians,—that the French ambassadors contended, before the council of Constance, that Christendom

[*e*] The word *Transaction* here means an agreement in which controverted matters are finally settled; it is a technical law term in the civil law, synonymous to the word *fine* at ımmon law. *Concordat* is a word of similar import; both ', a settlement or compromise, *finalis concordia*, 2 Blackst. 351.

was

was divided into the four great nations of Europe, Italy, Germany, France, and Spain; and that all the lesser nations, among which they reckoned England, were comprehended under one or other of them; but the English asserted, and their claim was allowed by the council, that the British Islands should be considered a fifth and co-ordinate nation, and entitled to an equal vote with the others. —In the different atmospheres of Venice and Rome, the history of the council of Trent has been written by the celebrated Fra Paolo, (the translation of whose work, with notes by Dr. Courayer, is more valued than the original), and by cardinal Pallavicini. The Cardinal does not dissemble, that some of the deliberations of the council were attended with intrigues and passion, and that their effects were visible in various incidents of the council: but he contends, that there was an unanimity in all points which related to doctrine, or the reformation of manners: and Dr. Courayer, in the Preface to his translation, concedes, "that, "in what regarded discipline, several excellent regu- "lations were made according to the ancient spirit "of the church;" and observes, that, "though "all the disorders were not reformed by the coun- "cil, yet, if we set aside prejudice, we may with "truth acknowledge, they are infinitely less than "they were before." The classical purity and severe simplicity of the style in which the decrees of the council are expressed, are universally admired,

mired, and are greatly superior to the language of any part of Justinian's law. In what concerns faith or morals, the decrees of the council of Trent have been received, without any restriction, by every Roman Catholic kingdom: all its decrees have been received by the Empire, Portugal, the Venetians, and the Duke of Savoy, without any *express* limitation; they have been received by the Spaniards, Neapolitans, and Sicilians, with a caution, as to such points of discipline as might be derogatory to their respective sovereignties: but the council was never published in France. No attempt has ever been made to introduce it into England. Pope Pius the Fourth sent the acts of the council to Mary Queen of Scots, with a letter dated the 13th of June 1564, urging her to have the decrees of the council published in her dominions; but nothing appears to have been done in consequence of it. See *Histoire de la Reception du Concile de Trente, dans les différens Etats Catholiques;* Paris, 2 vol. 8vo, 1766.

3. *The Bullarium*, or the collections which have been made of the Bulls of Popes: the best of these collections is that printed at Luxenburgh or Geneva in 1771. It extends to the year 1753.

4. To these are to be added, *Regulæ Cancellariæ Romanæ*, or the Rules of the Roman Chancery, a court instituted by the see of Rome, for preparing and transmitting the receipts and letters of the pope; *the sentences and ordinances of the various congregations*

congregations of cardinals at Rome; and the decisions of the Rota, the supreme tribunal of justice at Rome, both for its spiritual and its temporal concerns.

5. These complete the body of the Canon Law.—It should be observed, that, in addition to it, every nation in Christendom has its own national Canon Law, composed of *Legatine*, *Provincial*, *and other Ecclesiastical Constitutions*. The Legatine Constitutions of England are the ecclesiastical laws enacted in national synods, held under the cardinals Otho and Othobon, in the reign of Henry the Third. The Provincial Constitutions are principally the decrees of provincial synods, held under divers Archbishops of Canterbury, and adopted by the province of York, in the reign of Henry the Sixth. "At the dawn of the Reformation," (Sir William Blackstone, Comm. 1 vol. Inst. s. 3.), "in the "reign of King Henry VIII. it was enacted in par- "liament that a review should be had of the Canon "Law; and, till such review should be made, all "canons, constitutions, ordinances, and synodals "provincial, being then already made, and not re- "pugnant to the law of the land, or the king's "prerogative, should still be used and executed. "And, as no such review has yet been perfected, "upon this statute now depends the authority of "the Canon Law in England.

"As for the canons enacted by the clergy under "James I. in the year 1603, and never confirmed "in

" in parliament, it has been solemnly adjudged " upon the principles of law and the constitution, " that where they are not merely declaratory of " the ancient Canon Law, but are introductory of " new regulations, they do not bind the laity; " whatever regard the clergy may think proper to " pay them."

VI.

With respect to the AUTHORITY OF THE CANON LAW, from which, in the present case, the part of it anterior to Gratian's decree, and subsequent to the Extravagantes Communes, must be excluded; it is composed of texts out of the Bible, passages from the writings of the fathers, the canons of general and particular councils, the decrees and rescripts of popes, and various other insertions and extracts. In each of these particulars, it possesses all the authority, which the extract itself has; besides which, it possesses all the weight and authority, which it has acquired, by its having been so much adopted by courts, appealed to in disputes, taught in the schools, and praised and commented upon by the learned men of every state of Christendom. With more or less limitation, it forms the basis of the ecclesiastical law of every country, where the Roman Catholic religion is professed; and, speaking generally,

rally, in protestant countries, it has the force of law, when it is not repugnant to the law of the land.*

* The works, principally used in framing this account are, *Fleury's Institutions du Droit Ecclesiastique; his Discours sur l'Histoire Ecclesiastique; bishop Gibson's learned but very high-church Preface to his Codex Juris Ecclesiastici Anglicani; lord Hardwicke's argument in the case of Middleton v. Crofts*, 2 *Atk.* 650; *Pehem's Prælectiones in Jus Ecclesiasticum Universum, Lovanii*, 4 *vol.* 8*vo*, 1787; *Boehmer, Jus Ecclesiasticum Protestantium Halæ Magdeburgicæ*, 6 *vol.* 4*to*, 1756; *Gerhard Von Mastricht Historia Juris Ecclesiastici et Pontificii, Duisburgii ad Rhenum, Oct.* 1676; *Doujat's Histoire du Droit Canonique, Paris*, 8*vo*, 1677; *Van Espen's Jus Ecclesiasticum Universum, Lovanii*, 6 *vol. fol.* 1753, a work, which, for depth and extent of research, clearness of method, and perspicuity of style, equals any work of jurisprudence which has issued from the press; but which, in some places, where the author's dreary Jansenism prevails, must be read with disgust:—a methodical and learned work with this title, "*Quis est Petrus? Seu Qualis Petri Prima-*"*tus? Liber Theologico-Canonico Catholicus. Editio secunda,* "*correctior et emendatior, cum Approbatione, Ratisbonæ,* "1791;" the ablest work, in support of the papal prerogatives against the doctrines of the Sorbonne, which has come to the writer's knowledge. His account of Isidore's Decretals is particularly interesting. *The Religionis Naturalis et Revelatæ Principia of Doctor Hooke, Paris*, 3 *vols.* 8*vo*, 1774; the third volume of this work is, perhaps, the best treatise extant, on the ecclesiastical polity of the church, according to the notions of the Sorbonnists. It deserves to be more known in this country; it must have given the French divines an high opinion of the perspicuity and precision of English writing.

APPENDIX.

NOTE I.

THE EXCLUSIVE DOMINION AND PROPERTY OF THE BRITISH SEAS is one of the most splendid and valuable prerogatives of the Crown of England.—The following account of it is taken from a note to that part of the fourteenth edition of Coke upon Littleton, which was executed by the present writer.

"The *Jus Maris* of the king may be considered under the two-fold distinction, of the *right of jurisdiction*, which he exercises by his admiral, *and his right of property or ownership.*

With respect to the right of jurisdiction, the subject is elaborately discussed by Mr. Selden, in his *Mare Clausum*, a noble exertion of a vigorous mind, fraught with profound and extensive erudition. In the first part of it, he attempts to prove, that the sea is susceptible of separate dominion. In this, he has to combat the opposite opinion of almost all civilians, and particularly the celebrated declaration of one of the Antonines, (L. 9. D. De Lege Rhodiâ) "*Ego quidem mundi dominus, lex autem maris, &c.*" by which the emperor has been generally considered to have disclaimed any right to the dominion of the sea. For a different interpretation of this law, Mr. Selden argues with great ingenuity. In this, he is followed, in some measure, by

by Bynkershoek, in his treatise *De Lege Rhodiâ de Jactu, Liber Singularis*, in the 2d vol. of the edition of his works published by Vicat, Col. Allob. 1761. Mr. Selden, in the second part of his work, attempts to shew, that in every period of the British History, the kings of Great Britain have enjoyed the exclusive dominion and property of the British seas, in the largest extent of those words, both as to the passage through and the fishing within them. He treats his subject methodically, and supports his position with the greatest learning and ingenuity. The reader will probably feel some degree of prepossession against the extent of this claim; but he will find it supported by a long and forcible series of arguments, not only from prescription, from history, from the common law, and the public records of this country, but even from the treaties and acknowledgments of other nations. Here he is opposed by Bynkershoek, in his Dissertatio de Dominio Maris, also published in the second edition of his works. But it will be a great satisfaction to the English reader to find, how much of the general argument used by Mr. Selden, is conceded to him by Bynkershoek. Even on the most important part of the argument, the acknowledgment of the right by foreign princes, Bynkershoek makes him considerable concessions: "Plus momenti," says he, "adferre videntur "gentium testimonia, quæ illud Anglorum imperium ag- "novere. De confessionibus loquor non injuria extortis, "sed libere et sponte factis. Esse autem hujusmodi "quasdam confessiones, neutiquam negari poterit." After this acknowledgment, corroborated as it is by other argu-

ments used by Mr. Selden, many will think his positions completely established. The chief objection made by Bynkershoek to the right of the crown of England to the dominion of the sea is, the want of uninterrupted possession, as he terms it, of that dominion. " So long as a nation has pos- " session of the sea, just so long," says Bynkershoek, " she " holds its dominion. But to constitute this possession, it is " necessary that her navies should keep from it the navies of " all other nations, and should themselves completely and " incessantly navigate it, avowedly in the act or for the " purpose of asserting her sovereignty to it." This, he contends, has not been done by the English; on this ground therefore he objects to the right of dominion of the English sea; and on the same ground he objects to the right of the Venetians to the dominion of the Adriatic, and to the right of the Genoese to the dominion of the Ligustic. But this seems carrying the matter too far. If it be admitted, (of which there unquestionably are many instances), that the sovereign power of a state may restrain her own subjects from navigating particular seas, she may also engage for their not doing it, in her treaties with other nations. It can never be contended, that after such a treaty is entered into, the acts of possession mentioned by Bynkershoek are necessary to give it effect and continuance, unless this also makes a part of the treaty. It is sufficient, if the acts of possession are so often repeated, as is necessary to prevent the loss of the right, from the want of exercise of it. In those cases, therefore, where the treaty itself, establishing the exclusive dominion we are speaking of,

of, is produced, the continued and uninterrupted possession mentioned by Bynkershoek cannot be necessary. But public rights, even the most certain and incontestible, depend often on no other foundations than presumption and usage. The boundaries of territories by land, frequently depend on no other title. Then, if Bynkershoek be right in his position, that the sea is susceptible of dominion, should not mere prescription and usage in this, as in any other case, be sufficient to constitute a right? Upon what ground are the continued and uninterrupted acts of possession, mentioned by Bynkershoek, required to constitute a title in this, more than in any other case of public concern? If this be thought a satisfactory answer to the objection made by Bynkershoek, the remaining difference between him and Mr. Selden, respecting the right of the British monarch to this splendid and important royalty will be inconsiderable. It is to be added, that Mr. Selden's treatise was thought so important to the cause, in support of which it was written, that a copy of it was directed to be deposited in the Admiralty. Those who wish to procure it, in an English translation, should prefer the translation published in 1633, by a person under the initials of J. H. to that by Marchemont Needham. On this subject (with the exception of Sir Philip Medows) subsequent writers have done little more than copy from Selden. The subject, however, is far from being exhausted. The system adopted by Sir Philip Medows, in his *Observations concerning the Dominion and Sovereignty of the Seas*, printed in 1689, is more moderate than Mr. Selden's. He calls in question, at least indirectly,

rectly, a material part of Mr. Selden's positions, and places the right of the kings of England to the dominion of the sea upon a much narrower ground. He confines it to a right of excluding all foreign ships of war from passing upon any of the seas of England, without special licence for that purpose first obtained; in the sole marine jurisdiction, within those seas; and in an appropriate fishery. He denies that the salutation at sea, by the flag and topsail, has any relation to the dominion of the sea; and he asserts, that, it was never covenanted in any of the public treaties, except those with the United Netherlands, and never in any of these till the year 1654; he contends it is not a recognition of sovereignty, but at most an acknowledgment of pre-eminence. His treatise is deservedly held in great estimation."

NOTE II.

THE ALPS begin with Col del Angentera, which lies to the west of a supposed line from Monaco to the Mons Visulus, or Monte Viso. Thence, they proceed, in a semicircular line of about 500 miles, first on the south-eastern limits of France, afterwards on the southern limits of Swisserland, the Grisons, and the Tyrol, and then on the western limits of Styria, Carinthia and Carniola to the Sinus Flanaticus, or the Gulph of Cornero on the Hadriatic.

1. The

1. The *Alpes Maritimæ* take their name from the sea of Genoa, and extend from it up to Mons Visulus or Monte Viso. The most noted mountains in this part of the Alps are the Camellon and the Tendê.

2. The *Cottian Alps* reach from Monte Viso to Mount Cenis; they received their appellation from a territory of that name, of which Suza was the metropolis; they contain the Mons Matrona, or the Mont Genevre, where the river Durance springs.

3. The *Alpes Graiæ* extend over Le Petit St. Bernard, the scene of the martyrdom of the Theban legion, to the Mons Jovis, or Le Grand St. Bernard. Hitherto the direction of the Alps is to the north.

4. On the northern side of that part of the Rhone, which flows over the Valais into the lake of Geneva, are the *Alpes Helveticæ;* on its southern side are the *Alpe Pennine*, the eastern chain of which is called *Alpes Lepontinæ:* they extend to the Mons Summus, or Mont St. Gothard.

5. The *Alpes Rhæticæ* extend from Mont St. Gothard over the Mons Adula, or the Adule, where the two fountains of the Rhine arise, to the source of the Drave. A mountainous country to the south of them, where the town of Trent lies, was called the *Alpes Tridentinæ.*

6. The *Alpes Noricæ* lie on the north of the Drave, and extend over parts of Austria, Styria, and Carinthia; not far from the close of them the *Alpes Pannonicæ* or Kahlemburgh mountains rise. The *Alpes Bastarnicæ* are the Carpathian mountains, the boundary of Hungary on the north and east.

7. The *Alpes Carnicæ* lie on the south of the Drave, and reach to Nauportus or Leyback, where the Alpine heights of

of Italy properly close. Two ranges of mountains proceed from them; the *Alpes Venetæ*, which extend into the Venetian possessions on the Terra Firma, and the *Alpes Juliæ* which are spread over the country from Forum Julii, or Friuli, to the eastern extremity of the Hadriatic.

Where the Alpes Carnicæ end, the *Mons Albius* begins: the *Alpes Bebianæ*, or the Welebitchian, or Murlakan mountains proceed from it, and extend southerly in a line of about 300 miles over Illyricum to *Mons Orbelus*, whence they branch into the Rhodope and Hæmus.

Such is the chain of the Alps. *The Apennines* are of equal celebrity. They rise in the Col della Tenda; after stretching on the east of the supposed line from the Portus Monæci to Mons Vesulus, along the Gulph of Genoa, at no great distance from the coast, they proceed eastwardly to the centre of Italy, and afterwards to the south, always approaching nearer to the eastern than to the western coast. After they arrive at the Mons Gargamus, they take a south-westernly direction, and reach the Calabrian extremities of Italy. This account of the Alps is taken from *Cluverius's Ital. Ant. lib.* I. *ch.* 30, 31, 32; *Cellarius's Geog. Ant. lib.* 2; *Busching's Geography; Chauchard's Map, published by Stockdale; Bergier's Histoire des Grands Chemins de l'Empire Romain*, 2 *vol.* 4*to*, *Brusselles*, 1738; *and Mr. Pinkerton's Geography, a work of great merit.*

NOTE III.

THE following account of the PRÆTOR's JUDICIAL POWER, and its variations, is given by Doctor Bever, in

in his History of the Legal Polity of the Roman State, B. ii. c. 6.

"Originally, no more than one prætor was appointed; but, as the splendour and reputation of this illustrious city daily drew to it a vast conflux of strangers, the judicial business increased beyond the power of a single magistrate to dispatch. This demanded, therefore, the creation of a second, to preside over the causes of foreigners; from whence he was called "Prætor Peregrinus," to distinguish him from the former, who, from the particular objects of his magistracy, was styled "Urbanus." When the empire received a further augmentation from the conquered provinces, each of these was allowed its provincial judge, with similar title and power.

Another century introduced a new refinement upon this institution. As the objects of judicature, both criminal and civil, multiplied apace, and a great variety of new causes arose, very distinct in their nature from each other, for the more easy and expeditious administration of justice, it was found necessary to throw them into distinct classes, called "Quæstiones," and to assign particular jurisdictions and judges to each, who were intituled Prætors and Quæsitors. These were obliged to exercise their respective jurisdictions within the city for the space of one year, after which they were dismissed into their several provinces, under the character of Proprætors. These great officers, of whatever rank or denomination, were first elected by the people, in the "comitia centuriata;" but the right of assigning them to their particular provinces belonged to the senate.

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The prætorian edicts, which constitute that branch of the old civil law now under consideration, were certain rules or forms, published by every prætor at the entrance upon his office, on the calends of January, signifying the methods whereby he proposed to administer justice during that year. These were hung up in the public court in a white table, for the inspection of suitors and practitioners; but the authority of them lasted no longer than the office itself, unless they received a fresh ratification from the successor, and in that case they were called " Edicta Translatitia."

The prætor had no power to abrogate or alter the laws, but only to temper them with equity, to apply them to the particular cases before him, according to his own ideas of justice, and to supply whatever was wanting, to give them their full and proper effect. His edicts, therefore, were considered only as the voice of the law, but not law in its most comprehensive meaning, unless they happened to be adopted and continued by succeeding magistrates; under which qualified character only they are considered by Justinian himself. But notwithstanding their inferiority of rank in the scale of legislation, they were yet held in the highest esteem by some of the greatest princes and statesmen in after times, and by none more than himself, as appears from his inserting so large a number of them in the Digest.

In process of time, indeed, as the age grew more corrupt, and as these judges were more intent upon their own private views and emoluments than upon a punctual and faithful administration of justice, they were very apt to vary even from their own edicts, when it happened to suit the convenience and

and interest of their friends or themselves. This opened a door to many shameful acts of injustice, and once more called forth that truly patriotic tribune, Caius Cornelius, under whose influence a law was enacted, to oblige the prætors to adhere to certain established rules, and not to depart from those which they themselves had laid down, at the entrance upon their respective magistracies."

NOTE IV.

THE following account of THE MODES OF QUOTING THE CIVIL AND CANON LAWS is taken from *Dr. Hallifax's Analysis of the Roman Civil Law*, Camb. 1775, Note on page 2.

It may not be amiss, for the sake of beginners, to explain here the method of *quoting* the several parts, which now compose the CORPUS JURIS ROMANO-CIVILIS. The INSTITUTIONS are contained in Four Books: each Book is divided into Titles; and each Title into Paragraphs; of which the first, described by the Letters *pr.* or *princip.* is not numbered. The DIGESTS or PANDECTS are in Fifty Books: each Book is distributed into Titles; each Title into Laws; and, very frequently, Laws into Paragraphs, of which the first is not numbered. The CODE is comprized in Twelve Books; each of which is divided, like the Digests, into Titles and Laws; and, sometimes, Laws into Paragraphs. The NOVELS are distinguished by their Number, Chapter and Paragraph.

The old way of quoting was much more troublesome, by only mentioning the Number, or initial Words, of the Paragraph or Law, without expressing the number either of Book or Title. Thus, § *si adversus* 12 *Inst. de Nuptiis* means the 12th Paragraph of the Title in the Institutions *de Nuptiis*, which paragraph begins with the Words *si adversus;* and which a modern Civilian would cite thus, I. 1. 10. 12. So *l.* 30 *D. de R. J.* signifies the 30th Law of the Title in the Digests *de Regulis Juris:* according to the modern way, thus, D. 50. 17. 30. Again, *l.* 5. § 3. *ff. de Jurejur.* means the 3d paragraph of the 5th Law of the Title in the Digests *de Jurejurando:* better thus, D. 12. 2. 5. 3. And here note, that the Digests are sometimes referred to, as in the last instance, by a double *f;* and at other times by the Greek Π or π. [*f*]

The method of quoting the ROMAN CANON LAW is as follows. The DECREE, as said above, consists of Three Parts; of which the first contains 101 Distinctions, each Distinction being sub-divided into Canons: thus 1 *dist. c.* 3. *Lex* (or 1 *d. Lex*) is the first Distinction, and 3d Canon, beginning with the word *Lex*. The second part of the Decree contains 36 Causes; each Cause comprehending several Questions, and each Question several Canons: thus 3. *qu.* 9. *c.* 2. *Caveant* is Cause the 3d, Question the 9th, and Canon the 2d, beginning with *Caveant*. The third part of the Decree contains 5 Distinctions, and is quoted as the first part, with the addition of the words *de Consecratione*, thus *de Conscer. dist.* 2. *can. Quia corpus* (or *can. Quia corpus* 35 *dist.* 2, *d. Conscer.*) means

[*f*] The mark ff by which the Digests are now generally quoted, originated from an error of the first law printers, who mistook the Greek Π hastily written for a double ff.

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the 2d Distinction, and the 35th Canon, of the Treatise *de Consecratione*, which Canon begins with *Quia corpus.*

The DECRETALS are in Three Parts; of which the first contains Gregory's Decretals in 5 Books; each book being divided into Titles, and each Title into Chapters: And these are cited by the name of the Title, and the number of the Chapter, with the addition of the word *Extra*, or the capital letter X: thus *c.* 3. *Extra de Usuris* is the 3d Chapter of the Title in Gregory's Decretals, which is inscribed *de Usuris;* which Title, by looking into the Index, is found to be the 19th of the 5th Book. Thus also, *c. cum contingat* 36. *X. de Offic. & Pot. Jud. Del.* is the 36th Chapter, beginning with *Cum contingat*, of the Title, in Gregory's Decretals, which is inscribed *de Officio et Potestate Judicis Delegati;* and which, by consulting the Index, we find is the 29th Title of the 1st Book. The Sixth Decretal, and the Clementine Constitutions, each consisting of 5 Books, are quoted in the same manner as Gregory's Decretals; only, instead of *Extra* or X, there is subjoined *in sexto*, or in 6. and *in Clementinis* or in *Clem.* according as either part is referred to: thus, *c. si gratiose 5. de Rescript. in* 6. is the 5th Chapter, beginning with *Si gratiose*, of the Title *de Rescriptis*, in the 6th Decretal; the Title so inscribed being the 3d of the 1st Book: And *Clem.* 1. *de Sent. et Re Judic.* (or *de Sent. et R. J. ut calumniis. in Clem.*) (or *c. ut calumniis.* 1. *de sent. et R. J. in Clem.*) is the 1st Chapter of the Clementine Constitutions, under the Title *de Sententiâ et Re Judicatâ;* which Chapter begins with *Ut calumniis*, and belongs to the 11th Title of the 2d Book.

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The EXTRAVAGANTS of John the 22d are contained in one Book, divided into 14 Titles: thus *Extravag. Ad Conditorem. Joh.* 22. *de V. S.* means the Chapter, beginning with *Ad Conditorem*, of the Extravagants of John 22d; Title, *de Verborum Significationibus.* Lastly, the Extravagants of later Popes are called *Communes;* being distributed into 5 Books, and these again into Titles and Chapters: thus *Extravag. Commun. c. Salvator. de Præbend.* is the Chapter, beginning with *Salvator*, among the *Extravagantes Communes;* Title, *de Præbendis.*

THE END.